Federal Court  Cour fédérale

Date: 20180829

Docket: IMM-2088-17

Citation: 2018 FC 869

Ottawa, Ontario, August 29, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

NOSAKHARE AGHAYERE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Nosakhare Aghayere (the "Applicant") is a 41-year old citizen of Nigeria and has lived approximately half of his life – including his entire adult life – in Canada. He is married to a Canadian woman and has three children, all of whom are Canadian citizens.

[2] After losing his permanent resident status as a result of two criminal convictions, he made an application to become a permanent resident on humanitarian and compassionate ("H&C") grounds. In support of the application, the Applicant advanced three factors: the best interest of his children, hardship, and his establishment in Canada.

[3] A Senior Immigration Officer (the "Officer") dismissed the application. The Officer found that the best interest of the children would be served by having the Applicant remain in Canada, but noted that this was not a determinative factor. The Officer also agreed that the Applicant had become established in Canada, but found that his business was able to continue during his incarceration (through the efforts of his wife), and that his deportation would effectively constitute a continuation of the *status quo* for his family. As for hardship, the Officer found that the Applicant would face the same socioeconomic conditions faced by all persons living in Nigeria upon return to that country, and addressed the Applicant's concerns about threats to his life by his co-conspirator by finding that the Applicant could choose to live in a different part of the country. Accordingly, the application for permanent residence was dismissed and the Applicant applied to this Court for judicial review.

[4] I have reviewed the Officer's decision and am setting it aside for the reasons below.

II. Facts

A. *The Applicant*

[5] The Applicant is a 41-year-old citizen of Nigeria. In October 1997, at the age of 20, he immigrated to Canada and became a permanent resident. In 2005 he married Theresa Kashama (Ms. Kashama), a naturalized Canadian citizen from the Democratic Republic of the Congo, and together they have three minor Canadian children. Prior to his incarceration, the Applicant was self-employed, operating an automotive import/export business to Nigeria, as well as a music promotion/multimedia company. Ms. Kashama operated the automotive shop in his absence, and is also employed full-time at an auction house.

[6] In May 2003, the Applicant pled guilty to one count of fraud over $5,000 and two counts of fraud under $5,000. Before he was convicted, the Applicant had cooperated with fraud detectives to expose some fraud schemes that involved Nigerians living in the Toronto and Peel regions, including those of a former co-conspirator and tenant in his home, Courage Idahosa ("Mr. Idahosa"). The Applicant assumed those discussions were confidential, but the trial process revealed much of his involvement in the investigation.

[7] In August 2008, a removal order against the Applicant was issued, but the Immigration Appeal Division ("IAD") issued a five-year stay of that removal order in June 2010.

[8] On September 15, 2011, the Applicant was convicted of conspiracy to commit fraud, possession of forgery instruments, and possession of stolen property. These charges related to a

second set of events that took place in 2007. As a result of his conviction, the stay of the removal order was cancelled by section 68(4) of the *Immigration and Refugee Protection Act* ("IRPA"), as confirmed by the IAD in February 2012. The Applicant appealed the conviction, but in January 2016 the Ontario Court of Appeal dismissed the appeal. He was incarcerated at that time, but has since been released.

[9] The Applicant avers that he was unaware that the termination of the stay caused him to also lose his permanent resident status. After learning of this, the Applicant made an application for permanent residence from within Canada on H&C grounds or, in the alternative, a Temporary Resident Permit ("TRP").

[10] Since 2007 until as recent as 2016, the Applicant has been threatened by Mr. Idahosa, who blames the Applicant for his own conviction and deportation back to Nigeria.

B. *H&C Decision*

[11] By way of a decision dated April 13, 2017, the Officer denied the Applicant's H&C request. The Officer identifies the best interest of the Applicant's children, risk (from co-accused, kidnapping), and establishment as the H&C factors put forward by the Applicant. The Officer then reviews the general situation facing the Applicant should he return to Nigeria: he would be separated from his family, his children will suffer and will grow up without a father, and it will negatively impact his business.

[12] The Officer then proceeds to consider the best interest of the Applicant's children. The Officer notes that psychiatrist Dr. Parul Agarwal ("Dr. Agarwal") assessed the children for a determination about the impact that separation from their father would have on them. The Officer recounts the report's findings: the children have been affected by their father's absence due to incarceration, they do not understand that he is in jail, they have visited him at a minimum security institution, and they believe that he is coming home soon. Relying upon mental health literature, Dr. Agarwal assesses the children to be at risk of anxiety and depression should they face prolonged separation from their father. If the Applicant is sent to Nigeria, Dr. Agarwal further stipulates that the children will be indirectly affected through their mother, who will be left with the challenge of parenting three children on her own on a permanent basis. As such, the Officer concludes that the children's best interest is served by reuniting them with the Applicant after his sentence, and decides that this factor will be considered in the global assessment of the case.

[13] With respect to establishment, the Officer finds that the Applicant was a permanent resident, causing him to believe that he would not leave Canada except of his own volition. He married a Canadian, has Canadian children, and immigrated here in his youth. The Officer again decides that establishment will form part of the global assessment of the case.

[14] Finally, the Officer undertakes a "global assessment" of the Applicant's case. The Officer acknowledges that the family will suffer emotionally, but notes that the Applicant's wife has already been working and running his business while he was in jail, such that the Applicant's removal to Nigeria will be a continuation of the *status quo*. The Officer further determines that

the Applicant has occasionally returned to Nigeria for business, and it is likely that he can continue his business from Nigeria. The Officer further acknowledges that the separation of the Applicant from his family will likely become more permanent if the application is denied, causing the Applicant and his family "to be unhappy, lonely and depressed" (H&C Decision, p. 6). The Officer again recalls that the best interest of the children are served by having the Applicant remain in Canada, but notes that this is not the only relevant consideration, and that a negative decision will be a "continuation of much of what has already taken place." With respect to the danger posed by Mr. Idahosa, the Officer relies upon a former pre-removal risk assessment ("PRRA") determination that addressed this issue by finding that the Applicant had neither rebutted the presumption of state protection, nor provided evidence of personalized risk. To this, the Officer adds that the Applicant may choose to live somewhere else in Nigeria, away from Mr. Idahosa. The Officer summarizes the Applicant's submissions that he is unlikely to re-offend and finds that the Applicant has taken responsibility for his actions, but notes that the offences "demonstrate a pattern in the Applicant's approach to his financial requirements" and theorizes that "there is no guarantee that the Applicant will not have similar motivations to commit crime in the future or that he will not act upon them" (H&C Decision, p. 7, 8).

C. *Temporary Resident Permit*

[15] While the H&C decision did not refer to the Applicant's alternative request for a TRP, on April 19, 2017, the Officer sent the Applicant a letter in reference to his application for a TRP in the context of his H&C application. In the letter, the Officer states that guidance was sought from the "Operational Management and Coordination branch" who advised the Officer to provide

instructions about how to apply for a TRP, apparently suggesting that the TRP must be made in a separate request.

D. *Procedural History*

[16] On December 18, 2017, subsequent to filing leave for judicial review in the case at bar, the TRP was reconsidered on consent of the Respondent. Immigration, Refugees and Citizenship Canada (the "IRCC") granted the TRP, but only for the limited purpose of conferring temporary status on the Applicant for six months, such that he could complete his application for judicial review. The IRCC expressly refused to consider the TRP for the reason requested, namely to allow the Applicant to remain in Canada and demonstrate his rehabilitation. The Applicant sought judicial review of that decision in a related proceeding (court file number IMM-14-18).

[17] On January 31, 2018, Prothonotary Aalto consolidated IMM-14-18 and the case at bar (IMM-2088-17) under the court file number IMM-14-18.

[18] By way of an order dated April 4, 2018, Justice Harrington dismissed the application for leave for judicial review of the December 2017 TRP decision. On April 13, 2018, he granted leave to commence the application for judicial review in the case at bar, and the judicial review proceeded under court file number IMM-2088-17.

III. Issues

[19] While the Applicant sets out many issues to be addressed on this application for judicial review, I would frame the primary issue to be decided as follows:

A. Was the Officer's analysis of the Applicant's H&C factors unreasonable?

IV. Standard of Review

[20] The Officer's finding is reviewable upon a standard of reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44).

V. Analysis

A. *Was the Officer's analysis of the Applicant's H&C factors unreasonable?*

[21] The Applicant advances several grounds for which he perceives that the decision under review is unreasonable. I will consider each in turn.

(1) Did the Officer reasonably assess the Applicant's rehabilitation?

[22] The Applicant notes that he made many submissions about his rehabilitation, including the fact that his last charges occurred 10 years ago, his motivation to remain in Canada with his spouse and children, the fact that he has not breached any conditions imposed upon him by criminal or immigration authorities, and he has been assessed as low risk to re-offend. The Applicant argues that the Officer focused on his criminality and imposed an impossible standard

by concluding that there was “no guarantee” that he would not re-offend. The Applicant further argues that the Officer was required to assess the degree of the Applicant’s rehabilitation, including his correctional reports, which he analogizes to psychological assessments (which normally deserve substantial weight).

[23] The Respondent argues that the Officer considered many factors when evaluating the Applicant’s criminal inadmissibility, including his prior denial of any involvement in the 2007 scheme and the IAD’s finding that he was not rehabilitated. The Respondent further notes that the Officer made observations concerning the shared pattern of criminal behaviour between both offences (i.e. an alteration of cheques and plan to defraud). In addition, the Respondent recalls the jurisprudence of this Court which entitles the Officer to the presumption that all evidence was taken into account, and notes that in any event the Officer did make mention of the correctional reports. In the Respondent’s view, it would be antithetical to the jurisprudence to minimize the Applicant’s criminal inadmissibility, which has held that criminality of non-citizens is a major concern in the objectives of the IRPA.

[24] In my view, the Officer’s analysis on this question was unreasonable. I agree with the Respondent’s position that the Officer undertook a fulsome consideration of the evidence, but the fact that the Officer concluded that there is “no guarantee” that the Applicant would re-offend is clear evidence that an unattainable (and therefore unreasonable) standard was applied in the case at bar. As the Applicant correctly points out, it is impossible to guarantee that any person will not commit a criminal offence; if the Officer’s approach is correct, it would mean that a foreign

national with a criminal record could never qualify for H&C relief. That appears to be the standard to which the Officer held the Applicant, and that standard is unreasonable.

(2) Was the Officer's consideration of the best interest of the Applicant's children reasonable?

[25] The Applicant contends that he made a compelling case in his H&C application that the best interest of his three children necessitated that he remain in Canada, which was supported by the expert evidence of Dr. Agarwal. The Applicant notes that the Officer agreed with that conclusion, but unduly minimized the children's interests in two ways. First, the Applicant says that the Officer took a "basic needs" approach when considering the best interest of the children, and cites a line of jurisprudence that has condemned that as the incorrect approach. Second, the Applicant says the Officer erred by concluding that the children had learned to live without their father, again citing a line of jurisprudence that condemns such an approach.

[26] The Respondent does not provide a substantive reply to the issues raised by the Applicant, but instead characterizes the Applicant's concerns as matters pertaining to the Officer's discretionary weighing of the best interest of the children. Relying upon the Federal Court of Appeal's (the "FCA") decision in *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*], the Respondent notes that the best interest of the child does not obviate an officer's obligation to consider the broader policy concerns arising from inadmissibility on an H&C assessment, and that the degree of hardship to children must be weighed in concert with all H&C factors.

[27] In my view, the Officer did not take a "basic needs" approach to the children's best interest. The Officer accepted that the best interest of the children would be served by having their father remain in Canada, and I do not find that the reasons "set the bar" at the children's basic needs.

[28] That having been said, I agree with the Applicant that the Officer erred by concluding that the children had become accustomed to living without their father. The Officer's analysis focussed on the existing separation, stating that "his removal to Nigeria will be a continuation of the one that is already underway" and that "[t]he family have already experienced a separation and therefore moving forward with that will be a continuation of much of what has already taken place" (H&C Decision, p. 6, 8). Concluding that a child's existing separation from a parent diminishes the impact of removal is a perverse interpretation of the best interest of the child analysis. In any event, the Officer came to this conclusion without reference to the evidence pointing in the opposite direction, namely Dr. Agarwal's report, which discusses how future and prolonged separation will negatively impact the children. The Applicant is correct to point to the FCA's decision in *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 [*Hawthorne*] for the proposition that the relevant point of comparison is the children's life with their father, not the period for which he was absent. Moreover, in my view the FCA's decision in *Kisana* is not inconsistent with *Hawthorne*. The former case says that the degree of hardship caused to the child must be weighed together with all other factors, which is not disputed.

(3) Did the Officer err in assessing the hardship to the Applicant, if removed?

[29] The Applicant argues that the Officer failed to properly analyze both the particularized and generalized risk that he faces should he return to Nigeria. The particularized risk relates to the threat posed by Mr. Idahosa, which the Officer dismisses by suggesting that the Applicant can simply relocate somewhere far from him upon return to Nigeria. The Applicant argues that this presupposes, without evidence, that the Applicant knows where Mr. Idahosa is located, and fails to take into account the hardships associated with avoiding the risk that Mr. Idahosa poses to the Applicant. The generalized risk relates to the socioeconomic and security problems in Nigeria, which the Officer dismisses by claiming that this is something that everyone in Nigeria must manage. The Applicant submits that this approach improperly imports a requirement from section 97 of the IRPA, and cites a line of case law from this Court that has repeatedly upheld that the application of that "generalized risk" criterion in an H&C application is both unreasonable and incorrect.

[30] The Respondent argues that the Officer considered the possibility of danger from Mr. Idahosa, noting that the Officer reviewed this issue when conducting the Applicant's PRRA (the same Officer processed the Applicant's PRRA and H&C applications). With respect to generalized risk, the Respondent acknowledges that this concept is applicable under section 97 of the IRPA and not H&C applications made under section 25(1), but recalls that the onus of proving hardship lies with the Applicant.

[31] I again agree with the Applicant. In considering the hardship the Applicant would face if he were to return to Nigeria, the Officer made a factual finding (that he could avoid Mr. Idahosa) that is not based on the evidence, which makes it unreasonable. This constitutes a reviewable error because it is impossible to know whether the Officer would have arrived at the same conclusion had the unreasonable factual finding not been made. Moreover, the Respondent effectively acknowledges that the Officer applied the incorrect legal test by importing a requirement from section 97 of the IRPA.

[32] This application for judicial review is allowed. The Applicant has shown that the Officer committed several reviewable errors in considering his application for permanent residence on H&C grounds. For these reasons, the decision must be returned for reconsideration by a different officer.

VI. Certification

[33] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

JUDGMENT in IMM-2088-17

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter returned back for redetermination by a different officer.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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