Federal Court  Cour fédérale

Date: 20191126

Docket: IMM-2004-19

Citation: 2019 FC 1513

Ottawa, Ontario, November 26, 2019

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MODUPEOLA WINNIEFRED KOLADE
MOROLAOLUWA TENIOLA KOLADE
OMOROMOLA MOFE KOLADE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the rejection by a senior immigration officer [Officer] of an application for permanent residence on humanitarian and compassionate grounds [H&C], and an alternative request for a Temporary Resident Permit [TRP], which rejection is dated February 27, 2019 [Decision].

[2] These reasons were delivered orally from the Bench on November 21, 2019, at which time I reserved the right to edit the same for grammar, syntax, language, quotations and citations.

[3] The underlying facts are that the Principal Applicant and her two minor children are citizens of Nigeria. They arrived in Canada in June, 2016. In July, 2016, they filed a claim for refugee protection based on claims the family of the Principal Applicant's husband located in Nigeria, wanted the Minor Applicants to undergo female-genital mutilation [FGM]. The Refugee Protection Division [RPD] rejected their claims in September, 2016, stating the determinative issue was that there was an internal flight alternative [IFA] elsewhere in Nigeria. The Applicants appealed this decision to the Refugee Appeal Division [RAD]. In September, 2017, the RAD dismissed the appeal and confirmed the decision of the RPD that the Applicants are neither Convention refugees nor persons in need of protection.

[4] At the time of the Decision, the Principal Applicant was in her mid-to-late thirties, and her two daughters were around 10 years of age, one younger and one older. Their H&C application was based on establishment in Canada, hardship they would suffer by returning to Nigeria, and the best interests of the Minor Applicants. The Principal Applicant underwent FGM as a child and continues to suffer from the negative impact to her physical and psychological wellbeing. A psychiatrist, i.e., a medical doctor, at the Centre for Addiction and Mental Health [CAMH] diagnosed her with major depressive disorder and post-traumatic stress disorder [PTSD], and indicated the Principal Applicant's risk of suicide will increase if she returns to Nigeria.

[5] The standard of review of an H&C matter is reasonableness, as confirmed by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*].

[6] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[7] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole, as set out in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: see *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; and also *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[8] Before dealing with the particular issues in this case, as I raised at the outset of the hearing, I do not find in this case any material or substantial consideration of what I consider the second branch of *Kanthasamy*, namely, whether there are facts in the case which would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another so

long as these misfortunes warrant special relief. These are the teachings of *Kanthasamy* having regard to *Chirwa v. Canada (Minister of Citizenship and Immigration)*, (1970), 4 IAC 338 [*Chirwa*], which was an early decision in the humanitarian and compassionate context but which tended to be disregarded over the years as hardship became the primary focus of H&C decisions. Briefly put, the Supreme Court of Canada revived the *Chirwa* approach in *Kanthasamy* in addition to confirming a hardship analysis.

[9] If I may turn to hardship now, I agree with the Applicant that the Officer appears to have imported a risk assessment under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. I say this because he or she requested the Applicant to "overcome significant findings of the RPD and the RAD." In my respectful view this appears to put too high an onus on the Applicants because the H&C applied for was not an appeal from either.

[10] In addition, in my respectful view, the Officer in some ways substituted him or herself for the RAD with respect to state protection, contrary to the teachings of Justice Scott, as he then was, in *Uo v Canada (Citizenship and Immigration)*, 2011 FC 557, at para 50:

> The fact that the RPD found there was adequate state protection to preclude the applicants from refugee protection does not signify automatically that there is also adequate state protection in the H&C context such that it would preclude hardship.

[11] Turning to country conditions in the context of hardship, and again I discussed this at the hearing, the Applicants submit the Officer selectively referred to the United Kingdom Home Office Report "Country Policy and Information Note, Nigeria: Medical and Healthcare issues"

Version 2.0 (August 2018), while ignoring other parts in the same report, which contradict his or her findings.

[12] With respect, I have to agree. The Officer cited this UK report and noted in Nigeria that there are neuropsychiatry hospitals, medical schools with psychiatry departments, and six-state owned mental hospitals. The Officer then stated:

> It is evident from the documentary material that Nigeria has an officially approved mental health policy and there are mental health services available in Nigeria and the applicant has provided insufficient objective [evidence] to establish that she would be unable to access treatment should she require it.

[13] In my view, the Officer did not adequately consider other and contrary information contained in the same UK report, which states among other things, "[h]uman resources are not sufficient for the country's needs…there are less than 300 psychiatrists to Nigeria's estimated 180 million people." This fact seriously undermines the generality of the Officer's findings such as to make them almost unsupportable on the evidence.

[14] An additional concern I have with the country condition hardship analysis lies in connection with the Officer's consideration of the *Violence Against Persons Protection Act* [the *VAPP Act*], a statue of the federal legislature in Nigeria. The Officer concluded that the *VAPP Act* "protect[s] females from harmful traditional practices". However, the evidence of the US Department of State 2017 Report, excerpts of which were provided to the Officer but not cited, and which I am given no reason to doubt, was that the *VAPP Act* only applies in the federal district in Nigeria; the *VAPP Act* had not yet been enacted outside of that relatively small area.

Thus, and with respect, I am driven to conclude the Officer's finding is not supported by the evidence, and is again unreasonable.

[15] With respect to the best interests of the children, I am not at all satisfied the Officer was alert, alive and sensitive, as an Officer must be in this respect. I agree there are no magic words or magic formula and indicated that in *Jaramillo v Canada (Citizenship and Immigration)*, 2014 FC 744 at para 70:

> [70] Quite properly, there are neither verbal formulas nor magic words regarding the test for BIOC. However on judicial review, it is established that an officer must show that he or she is "alert, alive and sensitive" to the best interests of the child or children concerned.

[16] Nonetheless, I am very concerned with the Officer's analysis of the best interest of the children. I say this for several reasons. First, there is very extensive and excessive boilerplate used in this aspect of the analysis and indeed throughout this decision, of the sort criticized by Justice Rennie, as he then was, and others, as seen in *Velazquez Sanchez v Canada (Citizenship and Immigration)*, 2012 FC 1009 at para 19:

> [19] It has become commonplace to read H&C and PRRA decisions in which the reasons offered are confined to the following formula: "The applicants allege X; however, I find insufficient objective evidence to establish X." This boilerplate approach is contrary to the purpose of providing reasons as it obscures, rather than reveals, the rationale for the officer's decision. Reasons should be drafted to permit an applicant to understand why a decision was made and not to insulate that decision from judicial scrutiny: Lorne Sossin, "From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion" (2005), 55 UTLJ 427.

[17] In one instance, as an example, the Officer states:

> I have not been provided any objective evidence to substantiate this would not be available to all of the applicants upon their return to Nigeria. There is insufficient objective evidence before me that the minor applicants would not have the same opportunities. I also have insufficient objective evidence before me to indicate that extra-curricular activities are unavailable or inaccessible to students In Nigeria. I have not been provided with sufficient objective evidence.

[18] The last sentence serves no purpose. It seems to be the insertion of part of a drop-down menu, without a needed concluding clause or phrase. This is of concern.

[19] Further, the Officer's reasons exhibit real confusion with respect to the number and sex of the young children whose best interests the Officer was obliged to determine. The starting point is that there is a mother here and her two young children. Those are who the Officer is supposed to be considering in the best interests of the children analysis. At the start, the Officer gets it right in noting the children are both girls. However, the Officer then says "he will be returning". With respect, it is not "he" who would be returning (to Nigeria), but "they", and they are both girls, not boys. The same error is again made where the Officer says "[a]ny adjustments they will have to make, it is reasonable that they will do so with the care and support of his family." With respect it is not "his family", it is the family of not one but two little girls. Again both the sex and number of children are mistaken. The same H&C reasons go on to state: "I have not been provided sufficient evidence to persuade me that the children are assimilated or integrated in Canada to such an extent that if this application was to be refused that he would be unable to re-integrate or readjust in Nigeria, where they were born." Again, it's not a single boy who might or might not re-integrate, but two children, specifically the mother's two little girls.

The Court appreciated that we all make typographical or grammatical mistakes, but the Officer's duty in a case like this is to be alert, alive and sensitive to those who are actually before the Officer. These repeated mistakes with respect not only to the number of children and but as to their sex as well, frankly shakes me.

[20] With respect to the medical and professional evidence, and notwithstanding counsel's efforts to dissuade me, I am of the view that the Officer unreasonably cast doubt on the professional opinions provided in this case by complaining that there was a lack of ongoing treatment (on two occasions) in addition to a lack of counseling. In my respectful view, this is contrary to the teachings of the Supreme Court of Canada majority decision in *Kanthansamy* at paragraph 47:

> [47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required *Jeyakannan Kanthasamy* to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.
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> [Emphasis in original]

[21] In particular, the findings that concern me are:

> The Summary is dated over a year and half ago and l have insufficient supporting evidence before me to conclude that the applicant has sought any treatment for [name deleted] concerning her thoughts of suicide. In addition, I have insufficient evidence before me that [name deleted] regularly attends counselling sessions or that she is receiving ongoing treatment to deal with her suicidal thoughts.

[22] I am not able to reconcile these findings with the Supreme Court of Canada's teachings.

[23] In respect of establishment, I am concerned this aspect of the Officer's reasons is flawed by resort to what some may call a "catch-22", namely, that having set out all the positive successes achieved by an individual in Canada, and here the Officer does that both in respect of the mother and in respect of her two children, the Officer then, if one may use the word, "flips" that against them, to say "we can expect you to achieve the same success on your return to Nigeria." See the decision of Justice Rennie, who is now on the Court of Appeal, in *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 at para 26:

> [26] In other words, an analysis of the applicants' degree of establishment should not be based on whether or not they can carry on similar activities in Haiti. Under the analysis adopted, the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed. My colleague Justice Russel Zinn made the point well in *Sebbe v The Minister of Citizenship and Immigration*, 2012 FC 813 at para 21:
>
> > …However, what is required is an analysis and assessment of the degree of establishment of these applicants and how it weighs in favour of granting an exemption. The Officer must not merely discount what they have done by crediting the Canadian immigration and refugee system for having given them the time to do these things without giving credit for the initiatives they undertook. The Officer must also examine whether the disruption of that establishment weighs in favour of granting the exemption.

[24] I also dealt with this in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72, cited in the Applicants' material, where I concluded as Justice Rennie did, at para 35:

> [35] In my respectful view, the Officer's assessment of the Applicant's establishment was indeed filtered through the lens of

> hardship. The Officer gave significant weight to the support he received in respect of his years of community volunteer work, radio work and music – but immediately discounts it by referring to his ability to do volunteer work in the USA, i.e., he will not suffer much hardship. In my view, this focus on what he can do in the USA also runs afoul of what Justice Rennie, then of this Court, said in *Lauture v Minister of Citizenship and Immigration* 2015 FC 336 at 25: "... an analysis of the applicant's degree of establishment should not be based on whether or not they can carry on similar activities in Haiti. Under the analysis adopted, the more successful, enterprising and civic minded an applicant is while in Canada, the less likely it is that an application under section 25 will succeed."

[25] I said at the outset that judicial review is not a treasure hunt for error. There may be good reason for the Supreme Court of Canada ruling in this manner because Officers deal with a great number of applications and the occasional mistake or unreasonableness may creep into their reports. This Court, on judicial review, has to stand back and look at the case as an organic whole. It is not enough to add up the plusses and the minuses, and there are plusses in this case. However, there are also the minuses that I have specifically referenced in these reasons. The Court must be satisfied the decision as a whole falls within a range of possible, acceptable outcomes that are defensible on the facts and law. In my respectful analysis, this Decision does not meet that standard. Therefore, it must be set aside.

[26] The parties agree that the style of cause in this matter should be amended to show the Respondent as The Minister of Citizenship and Immigration, which will be done.

[27] Neither party proposed a question of general importance to certify, and I have identified none in this case.

JUDGMENT in IMM-2004-19

THIS COURT'S JUDGMENT is that:

1. The style of cause in this matter is amended to show the Respondent as The Minister of Citizenship and Immigration effective immediately.
2. Judicial review is granted.
3. The decision of the Officer is set aside and remanded for redetermination by a different decision-maker.
4. No question of general importance is certified.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2004-19
STYLE OF CAUSE:	MODUPEOLA WINNIEFRED KOLADE, MOROLAOLUWA TENIOLA KOLADE, OMOROMOLA MOFE KOLADE v. THE MINISTER OF CITZENSHIP AND IMMIGRATION
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