Federal Court  Cour fédérale

Date: 20231214

Docket: IMM-3955-21

Citation: 2023 FC 1691

Ottawa, Ontario, December 14, 2023

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

BLESSING UCHECHUKWU ONWUJIUBA
FAVOUR MMACHUKWU UMEZERIE O

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Blessing Uchechukwu Onwujiuba [Principal Applicant] and her daughter, Favour Mmachukwu Umezerie O [Associate Applicant], apply under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of a senior immigration officer's [Officer] decision dated May 31, 2021 [Decision] refusing to grant their application for permanent residence on humanitarian and compassionate [H&C] grounds

because the Applicants had not submitted sufficient evidence to establish that a return to Nigeria will result in forward-looking hardships that cannot be mitigated by the resources available to them.

[2] The Applicants argue the decision-maker erred in its finding that the Applicants do not meet the requirements for H&C under section 25 of the IRPA and in its analysis of the best interests of the child.

II. **Factual Background**

[3] The Principal Applicant is a citizen of Nigeria who entered Canada in August 2016 with her youngest daughter, the Associate Applicant, who is a citizen of both the United States and Nigeria. The Principal Applicant has four other children living in Nigeria with her ex-husband.

[4] The Principal Applicant married her current husband, whom she met in the United States, in November 2016. He is Canadian and initially filed a sponsorship application for the Applicants, which was incomplete. The Principal Applicant claims that her husband never provided immigration authorities with the requested documents and became abusive. The Applicants left her husband's house in September 2017, and the Principal Applicant has legally separated from her husband. The Principal Applicant is self-employed and has completed various trainings, including obtaining her high school diploma and personal support worker certificate. She also works as a warehouse packager.

[5] The Associate Applicant has specific medical needs and receives accommodations at school due to epilepsy, spastic cerebral palsy, difficulty with gross motor skills, and she is unable to walk without supports. She also lives with severe intellectual disabilities and requires assistance for all her needs. She received a genetic diagnosis and is followed by several specialists, including a cardiologist for heart conditions, and she takes anticonvulsant medications.

[6] In November 2017, the Principal Applicant claimed protection from her Nigerian ex-husband and his family, who she claimed threatened her because she is bisexual. In 2018, her claim was rejected; an appeal and subsequent judicial review were unsuccessful.

[7] In March 2021, the Applicants filed an application for permanent residence on H&C grounds based upon the Applicants' alleged hardship in Nigeria, establishment in Canada, and the best interests of the Associate Applicant.

[8] The Applicants argued that in Nigeria, education and accommodation, as well as medications prescribed to the Associate Applicant, would be inaccessible given the high costs of education and health care.

III. **Decision Under Review**

[9] The Officer began their Decision with an overview of the Principal Applicant's immigration history. The Officer then considered the submissions of her establishment through employment, church involvement, and connections in Canada. After recognizing the efforts

made to upgrade her education and make connections, the Officer concludes there is limited evidence of her financial stability, employment history, and tax obligations, and gives this factor neutral weight:

> Given the evidence submitted, I acknowledge that the applicant has made efforts to upgrade her education and has acquired a social circle in her community. Nonetheless, I note the applicant has submitted very limited evidence regarding her financial stability, employment history, or tax obligations. As such, the aforementioned evidence submitted carries a neutral weight for the purposes of this application.

[10] The Officer then summarized the psychologist's letter submitted to highlight the hardship she will endure if she were returned to Nigeria. The Officer gave this evidence little weight because there was no further information provided about subsequent consultations or mental health treatment:

> I conclude this one-time session is of low probative value. I assign low weight to this assessment for the purposes of the application.

[11] The Officer considered the allegations of spousal abuse and gave this factor low consideration because of the absence of evidence:

> I reiterate that her sponsorship application was refused because all of the information concerning the sponsor was missing. The applicant has not submitted any further information regarding her relationship with Mr. N'tumba. Given the insufficient evidence submitted, I attribute this factor low consideration.

[12] Regarding adverse country conditions, the Officer considered that the Principal Applicant's fears of discrimination were assessed by the Immigration and Refugee Board. The Officer also noted that the Principal Applicant indicated being self-employed in Nigeria in the

"trading sector" for 16 years, although no further evidence was submitted. The Officer did not find the Principal Applicant would be in a precarious employment situation in Nigeria. They assigned little weight to evidence of adverse country conditions:

> Overall, for the purposes of adverse country considerations, I am assigning high consideration to the IRB and RAD decisions. The applicant has not submitted sufficient evidence regarding adverse country consideration to address personalized hardships she may experience in Nigeria. The burden lies with the applicant to establish their returning situation in an H&C application and the status of their assets. As such, I am assigning little weight to the evidence submitted.

[13] Finally, the Officer considered the best interests of the child and concluded that there was no evidence she would not have access to adequate medical support in Nigeria. The Officer referred to a report by the United Kingdom Home Office that stated the availability of pediatric specialists in Nigeria:

> The applicant does not establish that, if returned to Nigeria, she would be unable to obtain access to the proper medical attention required by her daughter. I note, however, the latest UK Home Office report on Nigeria contradicts Ms. Onwujiuba's statement:
>
> > "There are health programs specifically for children and the content varies widely. […] The primary and secondary health centres design and run various programs that the paediatrician or the medical officer in charge of paediatrics come[s] up with."
> >
> > "A MedCOI response noted the availability of the following paediatric specialism: cardiologist, cardiac surgeon, haematologist, nephrologist, neurologist, oncologist, ophthalmologist, psychiatrist, psychologist, pulmonologist, surgeon and orthopaedic surgeon"
>
> As such, I highlight numerous health programs are available in Nigeria, which the applicant has not dismissed.

[14] The Officer also referred to the Nigerian Constitution, which states that the government shall provide free education "as and when practicable". Noting the absence of an education plan in the Applicants' materials, the Officer concluded there was insufficient evidence that the Associate Applicant's needs will not be met in Nigeria:

> Ms. Onwujiuba submits a letter from Favour's school principal, where he speaks highly of Favour and further states she has made many friends and is currently following an Individual Education Plan. I note this education plan has not been submitted by the applicant. In light of the insufficient evidence submitted by the applicant, I cannot determine Favour's needs will not be met in Nigeria.
>
> Overall, I conclude Ms. Onwujiuba has submitted insufficient evidence to determine Favour's best interests cannot be met in Nigeria. I note that based on the assessment above, if returned to Nigeria, Favour will continue to have access to health care and an education.

[15] In conclusion, the Officer determined she was not satisfied that the Applicants' H&C considerations justify granting them an exemption under section 25 of the IRPA and wrote:

> A Humanitarian and Compassionate application is not meant to make up for difference between country conditions. Rather, discretion is used in exceptional circumstances. In the case at hand, the degree of establishment of the applicant is neutral. Ms. Onwujiuba has not submitted sufficient evidence to establish that a return to Nigeria will result in forward-looking hardships that cannot be mitigated by the resources at her disposition. For the purposes of this application, I have remained alert to Favour's best interests. As such, based on the totality of the evidence submitted, I have considered that her best interests can continue to be met by her mother in Nigeria. For this reason, I have given low consideration to the best interest of the child factor. In this particular case, I find that the weight accorded to the BIOC is not enough to justify an exemption.
>
> The applicants bear the burden of proof in an H&C application. Having examined the circumstances cited in her application, I am of the opinion that granting the requested exemption is not justified by humanitarian and compassionate considerations. A visa

> exemption under sec. 25 of IRPA, is not justified in the applicant's case.

IV. **Issues and Standard of Review**

[16] The Applicants raise the following issues:

(1) Did the Officer err in the assessment of the best interests of the child?

(2) Did the Officer err in finding the Applicants do not meet the requirements for H&C relief under section 25 of the IRPA?

[17] The standard of review of a decision to deny H&C relief, as well as an analysis of the best interests of the child, is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 44).

V. **Analysis**

A. *The Officer's assessment of the best interests of the child?*

[18] With respect to the best interests of the child, the Applicants argue the Associate Applicant's interest in remaining in Canada should have been given considerable weight (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC)) because of the challenges she will face in Nigeria. The Applicants argue that the Officer was focussed on the availability of treatment in Nigeria without considering the affordability of such treatment for the Applicants (as mentioned in the 2013 UK Home Office UK Border Agency Country of Origin

Report for Nigeria). The Applicants argue they provided sufficient evidence of employment and housing discrimination in Nigeria for unmarried women (as indicated in the Nigeria 2019 Human Rights Report), and that the Principal Applicant had never done paid work in that country. They submit it was an error to ignore these considerations. With the Principal Applicant being her daughter's only caregiver, the Applicants argue their return to Nigeria will result in the Principal Applicant being unemployed and/or unable to support her daughter's numerous medical and educational needs.

[19] The Respondent argues that the Officer considered the Applicants' evidence and submissions that the Associate Applicant would be unable to access proper medical care in Nigeria. However, the Officer considered the objective country documentation from the most recent UK Home Office report on Nigeria, which found that there are numerous health programs available to children in Nigeria. With respect to the Applicants' submission that education is not free in Nigeria, the Respondent pointed to the Officer's reference to the Nigerian Constitution providing that the "Government shall, as and when practicable, provide free, compulsory and universal (…) education" and the Associate Applicant having access to an education, concluding that the Applicants submitted insufficient evidence that the Associate Applicant's best interests cannot be met in Nigeria.

[20] I agree with the Applicants that the Officer erred in their analysis of the best interests of the child.

[21] Immigration officers are required to be alert, alive, and sensitive to a child's best interest. This means considering the child's circumstances from their perspective (*Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 [*Williams*] at para 65; *Etienne v Canada (Citizenship and Immigration)*, 2014 FC 937 at para 9).

[22] The Officer did not question the Associate Applicant's complex medical, educational and occupational needs, but instead focused on whether the Principal Applicant had established her inability to support her child's needs in Nigeria. The Officer makes the following statements in the Decision:

> "The applicant does not establish that, if returned to Nigeria, she would be unable to obtain access to the proper medical attention required by her daughter."
>
> "I cannot determine Favour's needs will not be met in Nigeria."
>
> "I conclude Ms. Onwujiuba has submitted insufficient evidence to determine Favour's best interests cannot be met in Nigeria. I note that based on the assessment above, if returned to Nigeria, Favour will continue to have access to health care and an education."
>
> "For the purposes of this application, I have remained alert to Favour's best interests. As such, based on the totality of the evidence submitted, I have considered that her best interests can continue to be met by her mother in Nigeria. For this reason, I have given low consideration to the best interest of the child factor. In this particular case, I find that the weight accorded to the BIOC is not enough to justify an exemption."

[23] While the Officer appears sensitive to the Principal Applicant's *concern* for her daughter, at no point in the Decision does the Officer appear to grapple with how the severity of the Associate Applicant's physical and learning disabilities *affects her best interests*, and what this means in terms of her medical, occupational, and educational needs. The Applicants argue the

Officer applied the unusual and undeserved or disproportionate hardship test in the best interests analysis, citing Justice Michael Manson's decision in *Judnarine v Canada (Citizenship and Immigration)*, 2013 FC 82 [*Judnarine*], who in turn cites *Williams* at paragraph 47:

> In my view, the Officer's Decision in the present case is unreasonable, because although the Officer labelled his analysis "best interests of the child" and stated he is "alive, alert and sensitive regarding the best interests of the child", the question the Officer clearly asked himself in his analysis under this heading was whether removing the child "would have a significant negative financial, emotional, social or physical impact on him that would be i) unusual and undeserved or ii) disproportionate". As Justice James Russell states in *Williams*, at para 67:
>
> > A child's best interests are certainly not determinative of an H&C application and are but one of many factors that ultimately need to be assessed. However, requiring that certain interests not be "met" or that a child "suffer" a certain amount before this factor will weigh in favour of relief, let alone be persuasive in the decision, contradicts well-established principle that officers must be especially alert, alive and sensitive to the impact of the decision from the child's perspective. Furthermore, this would seem to contradict the instruction of the Supreme Court of Canada that this factor be a primary consideration in an H&C application that must not be minimized. [Emphasis added]

[24] In *Kanthasamy*, the Supreme Court discussed the best interests of the child principle, as it has been interpreted by other courts:

> [35] The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 11; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 20. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity: see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, at

> para. 89. The child's level of development will guide its precise application in the context of a particular case.
>
> [36] Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567, at para. 17. It means "[d]eciding what . . . appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": *MacGyver v. Richards* (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.
>
> (*Kanthasamy* at paras 35-36)

[25] From the Decision, the Officer appears to have considered only whether the Associate Applicant's basic needs would be met in Nigeria. It does not appear the Officer considered whether her particular, complex medical and educational needs would be met and whether it was in her best interests to return to Nigeria. The Officer made no mention of other submissions relevant to the best interests analysis, such as the fact that the Associate Applicant required assistance in her daily functions, or required individualized assistance with her education (like her principal attested to in his letter). The Officer did not consider these facts in light of the Principal Applicant being a single mother to the Associate Applicant and the objective evidence that single women face added difficulties in Nigeria.

[26] I recognize that a positive "best interests of the child" assessment will not necessarily result in a positive decision for an H&C application. However, because the evaluation of the child's best interests was done using an incomplete and improper lens, and without meaningful appreciation of the evidence regarding the Associate Applicant's unique needs, the Officer's reasoning is based on an incomplete and improper analysis, and the Decision is therefore unreasonable. The Officer needed to first properly assess what was in the best interest of the

Associate Applicant and why the harm that the child would experience by being removed to Nigeria was outweighed by the other factors as a consideration in the overall H&C assessment (see for example *Cordero Romero v Canada (Citizenship and Immigration)*, 2022 FC 1372 [*Cordero Romero*] at paras 25-26). An assessment of her basic needs was insufficient (*Cordero Romero* at paras 28-29).

B. *The Officer's finding the Applicants do not meet the requirements for H&C relief under section 25 of the IRPA?*

[27] Given the above error is sufficiently central to the Decision to render it unreasonable in my view, and that the above analysis is determinative of the matter at hand, the Court has not considered whether the Officer erred in finding the Applicants do not meet the requirements for H&C relief.

VI. **Conclusion**

[28] The Applicants have demonstrated a reviewable error in the RAD's Decision. For the forgoing reasons, I find the Decision unreasonable and must grant the application for judicial review. Neither party proposed any question for certification for appeal.

JUDGMENT in IMM-3955-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. No question is certified for appeal.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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