Date: 20080523

Docket: IMM-2161-08

Citation: 2008 FC 660

BETWEEN:

UGOCHUKWU COLLINS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] These are the Reasons why I granted a stay of Mr. Ugochukwu's removal to Nigeria, scheduled for this evening.

[2] Mr. Ugochukwu filed a refugee claim which was refused in 2004, as was his application for leave and for judicial review. The decision on his Pre-Removal Risk Assessment issued in April 2006 was also negative.

[3] He applied for permanent status within Canada as a member of the family class, but was rejected because at the material time his wife was on social assistance and ineligible to sponsor him. A subsequent straight H& C application was also refused.

[4] When he was called in on May 5 for an interview to arrange his removal, he attended with his wife and children, and pointed out to the officer that a fresh spouse or common-law partner in Canada class application had been filed. He swears that he provided supporting documentation, and the officer who interviewed him that day has not filed an affidavit in rebuttal.

[5] He was considered a flight risk and detained. His counsel then wrote to the enforcement officer to formally ask for a deferral on the same basis. The request was refused; hence the application for leave and for judicial review and the motion for a stay.

[6] The reasons for the decision were given by another officer and are found in notes to file which comprise a single page. These notes are dated May 12. The principal reason for the refusal was “there is no administrative deferral to applicants who are inadmissible for serious criminality under (A36)”, which is a reference to s. 36 of the *Immigration and Refugee Protection Act.* However the officer completely misread the file, as the requisite report to the Minister under s. 44 of the Act had been withdrawn for insufficient evidence.

[7] The notes continue “furthermore” and recite Mr. Ugochukwu’s history in Canada, including the negative PRRA and state “there is no evidence in Foss or on file that spouse has filed another

sponsorship application, regardless, the simple filing of an H&C application, does not provide a stay, and therefore not a justifiable reason for deferral."

[8] It is conceded that it takes some time for records to be updated, and there is nothing to contradict the applicant's affidavit that he provided an "application to sponsor an undertaking" to the first officer, copy of which was filed in the court record.

[9] Counsel for the Minister concedes the error with respect to serious criminality but points out that under Citizenship and Immigration Canada's Internal Processing Document 8 "Spouse or Common-law Partner in Canada Class" (IP8), the administrative deferral policy set out therein does not apply to someone who received a negative PRRA before filing the spousal application. That is quite true.

[10] However, as I read it, the rationale for the decision was primarily that Mr. Ugochukwu was inadmissible due to criminality and that there was no evidence that his spouse had filed an application. The first point was wrong, and the second point that the documentation had been provided to another officer a week earlier has not been contradicted.

[11] Thus we have to ask ourselves how the officer would have exercised his discretion had he had his facts right. IP8 provides that there is no administrative deferral with respect to an application filed after a negative PRRA, but on the other hand does not purport to fetter the officer's discretion, such as it may be under s. 48 of the Act.

[12] We know from *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44 that the right to a fair hearing must be regarded as an independent, unqualified right, and it is not for the Court to deny that right on the basis of speculation as to what the result might have been had discretion not been exercised on wrong principles (*Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558.). In this vein, the Minister has now brought forth information with respect to Mr. Ugochukwu's sojourn in Italy, which had not been disclosed to Canadian Immigration officers. That information was not in the record before the decision maker and so cannot be considered.

[13] As noted by the Court of Appeal in *North v. West Region Child and Family Services Inc* 2007 FCA 96, 362 N.R. 83 basing itself on *R v. Sheppard*, 2002 SCC 26, [2002]1 S.C.R. 869, the obligation to give reasons is a requirement of procedural fairness. In this case the reasons were wrong, and it is neither for the Minister nor the Court to speculate as to how the officer would have exercised his discretion had he had his facts right.

[14] The public policy with respect to the Spouse or Common-law Partner in Canada class is a commitment "to preventing the hardship resulting from the separation of spouses and common-law partners together in Canada where possible." Thus it alleviates some of the hardship inherent in a separation. The fact that Mr. Ugochukwu is caught up in the fine print does not automatically mean that an officer properly informed as to the facts might not have granted a deferral.

[15] Given the background in this case, the requirement that justice not only be done but must be seen to be done, as well as the tri-partite test for a stay as set out in such cases as *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 6 Imm. L.R. (2d) 123 (F.C.A.) a stay is in order. A refusal to defer cannot be based on reasons which are manifestly and palpably wrong.

"Sean Harrington"
Judge

Toronto, Ontario

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

CHRISTIAN CHIJINDU	FOR THE APPLICANT
TAMRAT GEBEYEHU	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CHRISTIAN CHIJINDU BARRISTER & SOLICITOR TORONTO, ONTARIO	FOR THE APPLICANT
JOHN H. SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA TORONTO, ONTARIO	FOR THE RESPONDENT