Date: 20080717

Docket: IMM-2758-08

Citation: 2008 FC 879

BETWEEN:

CHUKS NWAWULOR EBONKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

FRENETTE D.J.

[1] This motion is for an order staying the execution of a removal order against the applicant to Nigeria scheduled for July 10, 2008. I grant the stay for the following reasons.

I. The facts and the proceedings

[2] The applicant is a citizen of Nigeria who fled his country and sought refuge in Germany in 2003. That refugee claim was rejected. He arrived in Canada on March 13, 2005 and filed a claim for refugee protection. His claim was heard before a panel of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) on August 31, 2005. His claim was dismissed on October 26, 2005.

[3] He applied for leave for judicial review of the IRB decision on November 21, 2005; leave was refused on March 15, 2006. He submitted a spousal sponsorship application in July 2006. He applied for a Pre-Removal Risk Assessment (PRRA) hearing and by decision dated April 28, 2008, it was held to be negative. A humanitarian and compassionate (H&C) application was dismissed on April 30, 2008.

[4] The evidence revealed that the applicant married Carlene Paula Wray in Canada on July 16, 2006. She had given birth to a child, Jamar, on May 27, 2006, whose biological father was a former boyfriend.

[5] The applicant was employed until March 27, 2006, when he was struck by a pick-up truck and was seriously injured. Since then, he cannot do heavy work and lost his job. He follows medical treatments and physiotherapy.

II. The impugned decision

[6] The officer, N. Case, was the same person who considered the PRRA. The applicant sought an exemption from the in-Canada selection criteria based on H&C grounds to facilitate processing his application for permanent residence within Canada. The officer decided that the issues raised by the applicant could be resolved outside Canada and that he would not experience “unusual, underserved or disproportionate hardship if compelled to apply in the normal manner”.

III. The test for granting a stay of removal

[7] The test for granting a stay is whether:

a) A serious issue exists to be tried;

b) Irreparable harm will be caused if the stay is not granted; and

c) The balance of convenience favours the applicant.

See *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 6 Imm. L.R. (2d) 123 (F.C.A.). All of these conditions must be met in order to grant a stay.

a) Serious issue

[8] The applicant submits that the test for this subject is a "very low threshold" and that it has been met here (*Oberlander v. Canada (Attorney General)*, 2003 FCA 134, 303 N.R. 104).

[9] The applicant claims the officer made a reviewable error by relying on the findings of the RPD and PRRA as a basis for his H&C application as the test is not one of risk but is to be based on section 25 of the *Immigration and Refugee Protection Act*, (2001, c. 27) (*IRPA*):

Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances	**25. (1)** Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de

concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
Provincial criteria	**Critères provinciaux**
(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.	**(2)** Le statut ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

[10] The applicant alleges that the officer ignored the catastrophic financial consequences that would result from his removal from Canada. His injuries prevent him from being gainfully employed and presently he receives compensation from an insurance company which has admitted its liability resulting from the accident. He was advised that if he leaves Canada this income replacement will be terminated.

[11] He produced a letter from his personal injury lawyer, Ms. Karoly, who believes that he has a strong injury claim but that if he leaves Canada, it would be difficult if not impossible to pursue this

claim. He alleges that he could not work in Nigeria and could not receive adequate medical treatment there.

[12] The respondent replied that these facts were considered by the officer but that the applicant had not met the high threshold required when requesting an exemption from the application of section 11(1) of the *IRPA*, quoting *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206, 101 A.C.W.S. (3d) 995 (F.C.T.D.).

[13] The applicant alleges that the H&C officer's comments centered on risk if returned to Nigeria while it should have invoked the test as to whether he would have "unusual, underserved or disproportionate hardships", if returned to Nigeria.

[14] The respondent answers that the applicant had not provided sufficient objective evidence to support this claim.

[15] The applicant described the situation in Nigeria when he left and the fact that his brother was killed.

[16] The documentation about Nigeria which was before the officer, particularly the U.S. Department of State publication "Country Reports on Human Rights Practices – 2007", reveals an appalling situation where political violence is rampant and where the national police, army and

security forces commit extrajudicial killings, *e.g.*: “The Joint Task Force (JTF) conducted raids on militant groups in the Niger Delta region, resulting in numerous deaths and injuries”.

[17] The Niger Delta Region is the area where the applicant resided and to which he would be returned.

i. The best interest of the child

[18] The applicant submits that the H&C officer did not consider the best interests of the child directly affected, being his stepson Jamar. The respondent replied that the child was not mentioned in the documents and no evidence to support the applicant’s position on his stepson’s best interests was even produced. Therefore this is a non issue.

IV. Analysis

[19] An analysis of all the facts and the above submissions reveal that there are serious issues that require further examination in this case.

b) Irreparable harm

[20] The applicant alleges he would suffer irreparable harm if he was removed from Canada.

[21] Not only would his “new family” be separated but he would lose all the financial benefits and compensation resulting from his accident and his ability to obtain employment in the future. In

Nigeria, he could not generate an income and would neither obtain the medical treatments his injuries require nor be safe.

[22] The respondent answers that “irreparable harm” is a strict test and requires harm beyond the usual inconveniences of removal from Canada (*Kouchek v. Canada (Minister of Citizenship and Immigration)* (1995), 53 A.C.W.S. (3d) 1049, [1995] F.C.J. No. 323 (F.C.T.D.) (QL).

[23] An analysis of these submissions and the facts established, there is no doubt that the applicant would suffer “irreparable harm” if removed; well beyond the normal inconveniences.

c) Balance of convenience

[24] The balance of convenience is an assessment of which party would suffer the most from a removal or a deportation.

[25] There is no doubt that the respondent has an interest and a duty in seeing to the timely and effective execution of a removal order (*Membreno-Garcia v. Canada (Minister of Citizenship and Immigration)*, [1992] 3 F.C. 306, 55 F.T.R. 104 (F.C.T.D.).

[26] However, I believe the balance of convenience favors the applicant who besides the well-being of his family has a lot to lose as far as employment and compensation arising from the litigation resulting from his accident.

[27] The conditions for a stay have been met.

[28] Wherefore, the Court grants the application for a stay of execution until:

a. the disposition of the leave applications; and

b. if leave is granted, until such time as section 18 and 18.1 applications are disposed of by this Court.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2758-08
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APPEARANCES:

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