Federal Court  Cour fédérale

Date: 20130731

Docket: IMM-11989-12

Citation: 2013 FC 833

Ottawa, Ontario, July 31, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

IKECHUKWU OBI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision by an immigration officer (Officer) refusing his application for permanent residence in Canada on humanitarian and compassion (H&C) grounds. I have concluded that the Officer's decision was based on speculation and was made without regard to the relevant evidence. I have also concluded that the Officer fettered his discretion in considering the application before him. The application is therefore granted.

Background

[2] The applicant is a citizen of Nigeria and has lived in Gambia since 1993. He met his wife, Ms. Shylon, in 1998, after she had fled to the Gambia to escape civil war in Sierra Leone.

[3] Prior to their marriage, Ms. Shylon was referred to Canada for resettlement by the United Nations High Commissioner for Refugees (UNHCR) as a woman at risk. A Canadian immigration officer interviewed Ms. Shylon on March 2, 2000. The interview notes indicate that the only topic for the interview was Ms. Shylon's experience during the civil war. The notes corroborate her evidence that she was not asked whether she was in a relationship. The officer concluded that her application should be processed quickly because she had a child as the consequence of being raped by a rebel during the war.

[4] Ms. Shylon married the applicant on April 15, 2000 and subsequently advised a UNHCR official. That official told her to sponsor her husband for permanent residence after she landed in Canada. Apart from the interview of March 2, 2000, she dealt exclusively with the UNHCR prior to her immigration to Canada and only received her visa documents immediately prior to traveling.

[5] Ms. Shylon's evidence is that she advised an immigration official that she was married the morning she arrived in Canada, after landing. That official told her to sponsor the applicant once she paid off her transportation loan.

[6] The applicant applied for permanent residence in Canada as a member of the family class in 2003. The application was refused in 2005 because Ms. Shylon had not disclosed their marriage

before being granted permanent residence status. The applicant is now excluded from sponsorship in the family class pursuant to paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[7] Ms. Shylon has remained in Canada with her daughter but maintains her relationship with the applicant. She became a Canadian citizen on June 8, 2011.

Decision Under Review

[8] The applicant submitted an application in 2011 requesting H&C consideration pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). His counsel submitted that there were compelling reasons to allow the application, including the fact that Ms. Shylon had experienced trauma and torture during the civil war, was unaware that she needed to disclose her relationship and followed the guidance of persons in authority.

[9] Ms. Shylon was interviewed on January 17, 2012 and the interviewing officer recommended a positive decision. The interviewer accepted that Ms. Shylon had not been asked about her relationship prior to coming to Canada and had attempted to declare her marriage to an UNHCR official. The interviewer also accepted that there was no reason she would have tried to circumvent the law and that their relationship was stable and genuine. Finally, the interviewer noted that Ms. Shylon and the applicant may have difficulty reuniting in the Gambia or Nigeria as Ms. Shylon does not have status in those countries.

[10] The Officer responsible for deciding the case disagreed with this assessment and refused the application. In the decision letter, the Officer stated that he gave "…significant weight to the policy objective of preserving the integrity of the immigration system." He stated that Ms. Shylon failed to provide compelling reasons or a reasonable rationale for failing to disclose her marriage.

[11] The notes in the file complete the Officer's reasons. He wrote, "I find the sponsor's submission that she was unaware of her obligations to declare a change in martial status during the processing of her application to be credible." However, the next sentence reads, "The evidence supports a conclusion that the sponsor chose not to declare this dependant spouse at the time of her landing."

[12] For the purpose of this judicial review, the Officer has provided an affidavit attempting to explain the contradiction in the above notes as a typographical error. He states that he does not remember the applicant's case specifically but believes that he concluded that the applicant was not credible. Affidavits sworn after the decision has been made are routinely rejected as *ex post facto* attempts to bolster weak reasoning or to patch-up omissions. In this case, even were the affidavit allowed into evidence, it would not save the decision.

Analysis

[13] The issue for this judicial review is whether the Officer erred in denying the H&C application. The standard of review is reasonableness: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. The H&C application process provides relief from unusual, undeserved or disproportionate hardship. An immigration officer must weigh the factors favouring

family reunification in Canada against public policy concerns arising from a misrepresentation: *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, para 27.

First Ground - Deliberate Concealment

[14] The Officer based his decision largely on a finding that Ms. Shylon's nondisclosure was intentional. In doing so, he departed from the conclusions of the Immigration Appeal Division and the interviewer, both of which found that the nondisclosure was inadvertent.

[15] The Officer found that Ms. Shylon had a significant incentive to conceal her marriage, namely the possibility that she would not have been resettled in Canada had it been known that she was no longer a single mother. The existence of a motivation to lie is only one factor to be considered in assessing credibility. While relevant, it is not determinative: *R v Batte*, [2000] OJ No 2184, 49 OR (3d) 321, paras 120-121 (ONCA). All H&C applicants, and their sponsors, will have an interest in the outcome of their case. Their testimony may not be rejected for this reason alone. In this case, the Officer provided no further basis for disbelieving Ms. Shylon. Therefore, it was unreasonable to find that she had lied in her interview.

[16] Additionally, there is no evidence in the record that Ms. Shylon's resettlement in Canada actually depended on her being unmarried, much less that she knew this was the case. The interview notes from March 2000 indicate that her file was prioritized because of her daughter, not her martial status.

[17] The uncontroverted evidence in the record is that Ms. Shylon disclosed her marriage to a UNHCR official prior to being granted a visa. Her evidence was that the UNHCR official told her to sponsor her husband after landing. This is inconsistent with an attempt to conceal her marriage. It is also uncontroverted that she received her visa immediately prior to her departure for Canada. The reasons for the decision and the notes in the file do not indicate that the Officer considered this evidence in concluding that she had intentionally concealed her marriage.

[18] The heart of the Officer's decision was a finding of deliberate concealment by Ms. Shylon of her marital status. The interviewer who had recommended that the application be granted stated that, "it appears that the sponsor was not asked this question by the officer who granted her PR status." Nonetheless, the Officer concluded that "the evidence supports a conclusion that the sponsor chose not to disclose the dependent spouse at the time of landing."

[19] The officer who interviewed the applicant accepted that she had attempted to inform officials about her marriage at various points in the immigration process. The interviewer considered the applicant to be credible and was in the best position to make this assessment, having questioned her personally. While the decision maker is not bound by the interviewer's conclusions, it is unreasonable to discount them in circumstances such as this, where the documents and testimony support the interviewer's findings. A unilateral statement of disagreement is insufficient. Some explanation rooted in the evidence is required.

Second Ground – Fettering of Discretion

[20] There is a second, independent ground on which the decision should be set aside.

[21] The reasons make very clear that the Officer considered the misrepresentation to be the paramount and controlling factor in the exercise of his discretion. While misrepresentation and conduct are relevant considerations in the exercise of H&C discretion, they are not determinative. This point has been made consistently, but from different perspectives by judges of this Court.

[22] Justice Yves de Montigny situated the relationship between section 25 and inadmissibility findings in the broader context of the role section 25 plays in discharging Canada's obligations under international human rights law. He observed in *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533, at paragraph 25:

> That being said, one must not forget that the presence of section 25 in the IRPA has been found to guard against IRPA non-compliance with the international human rights instruments to which Canada is signatory due to paragraph 117(9)(*d*): *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 (CanLII), 2005 FCA 436, [2006] 3 F.C.R. 655, at paragraphs 102–109. If that provison is to be meaningful, immigration officers must do more than pay lip service to the H&C factors brought forward by an applicant, and must truly assess them with a view to deciding whether they are sufficient to counterbalance the harsh provision of paragraph 117(9)(*d*). As my colleague Justice Kelen noted in *Hurtado v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 552 (CanLII), 2007 FC 552, at paragraph 14, "if the applicant's misrepresentation were the only factor to be considered, there would be no room for discretion left to the Minister under section 25 of the Act." This is indeed recognized in the *Overseas Processing Manual (OP)*, Chapter OP 4: Processing of Applications under Section 25 of the IRPA, Appendix F, where officers are reminded that they should ensure "that their H&C assessments go beyond an explanation as to why applicants are described by R117(9)(d) to consider the positive factors an applicant has raised in support of his/her request for an exemption from R117(9)(d)."

[23] In *Phung v Canada (Minister of Citizenship and Immigration)*, 2012 FC 585, Justice Richard Mosley referred to *Sultana* and set aside a decision refusing H&C relief where the officer allowed his appreciation of the H&C factors to be "coloured " by the misrepresentations and fixated on the applicant's prior immigration history to the exclusion and detriment of other relevant considerations.

[24] An officer considering an H&C exemption starts from the premise that the applicant has already been deemed inadmissible. The integrity of the immigration system has been maintained by the exclusion order itself. What is in issue, rather, is whether there are circumstances which warrant relief from the usual consequences of the *IRPA*. As my colleague Justice Catherine Kane pointed out in *Kobita v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1479 at paragraph 29, at this stage it is not disputed that the applicant is not a member of the family class and is inadmissible, such that "…it appears to defeat the purpose of that section to dwell on the fact that the applicant is inadmissible as part of the H&C considerations."

[25] In this case, the Officer did indeed dwell. Apart from a reference *en passant* to the best interests of the child, he noted, and gave "significant weight" to the misrepresentation. In fact, in the course of a brief decision, he mentioned that he was giving "significant weight" to this factor on two occasions. The decision does not demonstrate the identification of relevant criteria and their subsequent weighing and balancing, characteristic of sound decision making.

[26] In sum, the decision does not stand up against the standard of reasonableness. It was unreasonable to conclude that Ms. Shylon was not to be believed simply because she had a motive

to lie, and it was unreasonable to reject an H&C application on the basis of a misrepresentation without considering the full range of relevant criteria.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the decision is set aside. The matter is remitted to a different immigration officer for reconsideration.

There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**IKECHUKWU OBI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
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