Federal Court  Cour fédérale

Date: 20131106

Docket: IMM-9694-12

Citation: 2013 FC 1127

Ottawa, Ontario, November 6, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

EHIZUELEN EMMANUEL UMANE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, the applicant requested permanent resident status on humanitarian and compassionate [H&C] grounds. He was refused. He now challenges that decision by bringing this application for judicial review.

[2] The applicant seeks to have the negative H&C decision set aside. In his application for leave and for judicial review, he further asked that the Court do one of three things:

1. grant the exemptions directly;

2. refer the matter to an appropriate authority but direct that authority to grant the exemptions; or

3. refer the matter to an appropriate authority for redetermination.

[3] In his oral submissions, he argued only for the third, but also asked for a direction that an earlier spousal sponsorship decision be ignored.

Background

[4] The applicant is a citizen of Nigeria. He claims that he fled the country on October 20, 2001 because he was being persecuted for his family's religious and political beliefs. He spent some time in other countries before arriving in Canada on September 28, 2008 and he sought refugee status at that time. His refugee claim was rejected on October 4, 2011.

[5] While that claim was still underway, however, the applicant also filed two applications for permanent residence: one under the spouse or common-law partner in Canada class (subsection 12(1) of the Act and section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]) and the other for H&C considerations. The main documents appear to have been signed on September 14, 2009, though some were signed later. They were received by Citizenship and Immigration Canada in October 2009.

[6] On September 1, 2010, an immigration officer sent a letter to the applicant which appeared to reject the spousal sponsorship claim but continue it as an H&C considerations application. Following receipt of that letter, Mr. Umane applied for judicial review. Pursuant to Rule 9 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, the Registry requested disclosure of the reasons from Citizenship and Immigration Canada [CIC]. CIC responded that "… no written decision or reasons exist in connection with the above-noted application."

[7] As it turns out, the officer had actually entered reasons into the Field Operations Support System [FOSS]. There are also notes of the interview. All of these notes are dated or signed September 1, 2010.

[8] However, those notes were never produced and the judicial review was apparently discontinued on January 28, 2011. In his affidavit, the applicant said that he did this because the lawyer representing the respondent at the time contacted the applicant's counsel and told him the application was premature since the "… application for permanent residence had not been rejected, but was still pending."

[9] On May 8, 2012, the applicant submitted additional materials in support of his H&C application.

[10] As well, the applicant says that he filed a fresh application for permanent residence under the spouse or common-law partner in Canada class on June 25, 2012.

Decision

[11] In a decision dated August 8, 2012, a senior immigration officer [the officer] rejected the H&C application. Although the applicant did not initially say from which provisions he sought exemption (and now identifies only section 11 in his application for leave and for judicial review), the officer approached it broadly and said it was for "an exemption from the in-Canada selection criteria and the requirement to not be inadmissible in Canada."

[12] The officer began by describing the events the applicant alleges occurred between leaving Nigeria and entering Canada and she observed that he had entered this country using a fraudulent passport. She went on to say that many of the applicant's claims about persecution and personal hardship in Nigeria had already been rejected by the Refugee Protection Division on the basis that Mr. Umane was not credible. She reviewed the conditions in Nigeria, but concluded that the applicant had failed to prove that they would have "a direct, personal negative impact on him, including his profile as a Christian, or that avenues of recourse or redress would not be available to him in Nigeria."

[13] She then assessed the degree of establishment in Canada. The officer admitted that some establishment could be expected since he had lived in Canada for four years, but held that "it cannot be argued that any resulting hardship was not anticipated by the Act or beyond the applicant's control." In reaching this conclusion, she acknowledged that he had provided a signed job offer, but she questioned the legitimacy of this document since the position offered did not match the position the applicant claimed to have. She also noted that his finances seemed to be managed satisfactorily, but that he had not proven that he owned any assets in Canada.

[14] Further, the officer found that the applicant had no family members in Canada except for his spouse and she disregarded the impact on the spouse because of the "… previous finding that the applicant's marriage was done for immigration purposes." Relying on the same finding, along with his conviction for marriage fraud in the United States, she also stated that "the applicant has demonstrated a disregard for the law in several countries."

[15] Finally, the officer acknowledged that the applicant had a seven year old son who was living in the United States. However, she found that returning the applicant to Nigeria would not affect that child's best interests since the applicant is banned from entering the United States in any event.

[16] As a result, the officer rejected the application.

[17] The officer also listed the sources upon which she relied. Among them was the "[r]equest for Exemption from Permanent Resident Visa Requirement application received 13 October 2009, including submissions and supporting documentary evidence and updated information." However, she stated in her affidavit that she did not consider the May 2012 submissions since they were not in the file at the time.

Issues

[18] The applicant alleged numerous grounds of error in his application for leave and for judicial review. To paraphrase, he criticized the decision-maker for: (1) following an irregular process; (2)

improperly fettering her discretion; (3) unreasonably weighing the evidence by considering irrelevant evidence, failing to consider relevant evidence, failing to understand the evidence and making erroneous findings of fact; (4) breaching the applicant's *Charter* rights; (5) breaching provisions of the Act and the Regulations; (6) failing to give an adequate opportunity to the applicant to respond to her concerns and doubts; and (7) relying on extrinsic evidence without giving notice to the applicant. He also alleged that the provisions of the Act governing the application were unconstitutional. Many of these issues were narrowed or abandoned in his submissions on the leave application.

[19] Further, the respondent now admits that the failure to consider the May 2012 submissions was a breach of procedural fairness. In light of that, most of the issues listed by the applicant were not argued.

[20] One disagreement remains: what is to be done with the notes made in relation to the spousal sponsorship decision? The applicant asks that the decision be set aside and the notes ignored in any redetermination of the H&C application. The respondent agrees that the sponsorship decision was problematic, but argues that the remedy should be to set aside the sponsorship decision, not discard the notes.

[21] Thus, the remaining issues are:

1. What is the standard of review?
2. Was there a breach of procedural fairness?
3. What should be done about the spousal sponsorship notes?

Analysis and Decision

[22] **Issue 1**

What is the standard of review?

The parties did not provide any submissions on standard of review, but both of the remaining issues are questions of procedural fairness. As Mr. Justice Binnie said at paragraph 43 of *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, "procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review." The officer is not entitled to any deference.

[23] **Issue 2**

Was there a breach of procedural fairness?

The applicant submitted additional materials which were received on May 8, 2012. They are in the record and their receipt is also recorded in the FOSS notes attached to the officer's affidavit. For some reason, perhaps through administrative error, they were not in the file when the officer decided the matter. As such, submissions properly before the decision-maker were ignored.

[24] The applicant argued that this was a breach of procedural fairness. The respondent agreed.

[25] Neither party advanced any submissions on the level of procedural fairness required by the factors in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. However, *Baker* itself dealt with an H&C grounds application. Madam Justice L'Heureux-Dubé said, at paragraph 32, that the procedural fairness required was more than minimal and that:

> … the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

[26] Here, although the applicant's May 2012 submissions were properly received, they were not "fully and fairly considered." They were not considered at all. Therefore, I agree that there was a breach of procedural fairness.

[27] As well, the breach could have potentially affected the outcome of the decision. To take just one example, the submissions included evidence that Ms. Pedro, the applicant's spouse, was pregnant. If it is accepted that the applicant is the father, this evidence potentially impacts the marriage legitimacy issue and the best interests of the children factor, both areas on which the officer found against the applicant.

[28] As a result of this breach of procedural fairness, the H&C decision must be set aside and referred to a different officer for redetermination.

[29] **Issue 3**

What should be done about the spousal sponsorship notes?

Procedurally, this case is somewhat strange and to understand this issue, it is necessary to set out the background in further detail. As mentioned earlier, the applicant made two applications for permanent residence at the same time: one under the spouse or common-law partner in Canada class and one for H&C considerations.

[30] The spousal sponsorship application was considered first and on September 1, 2010, the officer sent a letter to the applicant which said that:

> On October 5, 2009 you requested an exemption, based on humanitarian and compassionate consideration, in relation to the following requirement:
>
> - to be the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada [R124(a)];
>
> As a result, you do not meet the eligibility requirements for membership in the spouse or common-law partner in Canada class. Since you have requested humanitarian and compassionate consideration, your application will be processed as an application for permanent residence from within Canada based on humanitarian and compassionate grounds.

[31] That letter is confusing. The applicant was not asking for an exemption from the requirement of having a spouse; his primary claim was that he was married to Ms. Pedro and therefore had a spouse in Canada. The letter does not address that.

[32] However, the officer's FOSS notes reveal that the officer considered that question and concluded that the applicant did not have a genuine spousal relationship with Ms. Pedro. In particular, he noted two things:

1. When Ms. Pedro filed a police report regarding a missing passport, she could not provide the date of birth or the correct spelling of the applicant's name and she listed someone else as her nearest relative; and

2. When officers conducted a bed check while Ms. Pedro was out, no one there knew the applicant and Ms. Pedro's roommate said that he did not even know Ms. Pedro was married.

The notes record the excuses the applicant and Ms. Pedro gave for these situations, but the officer rejected them and concluded that:

> I am not satisfied that the sponsor and applicant are in a genuine spousal relationship, and not one entered into primarily for the purpose of acquiring any status or privilege under the Act.

[33] He then reviewed section 4 and subsection 124(a) of the Regulations and said that: "[s]ince the applicant is not considered a spouse within the meaning of Section 4 of the Regulations, he does not meet the requirements of the class."

[34] However, neither the applicant nor this Court received those notes, even when the applicant applied for judicial review and the Registry asked for reasons. Before now, the only relevant documents that the applicant received were that letter, the Rule 9 letter saying there were no reasons and a representation from the respondent that the matter was still pending.

[35] Thus, to set out the procedural history of this case concisely, a review of the record reveals the following:

1. The applicant originally filed a spousal application and an H&C application.

2. The applicant was sent a confusing letter about his spousal application on September 1, 2010.

3. After receiving this letter, the applicant filed a judicial review application of what he believed to be a decision.

4. The applicant, relying on the respondent's representation that no decision was made, discontinued his application for judicial review.

5. The applicant's H&C application was denied.

6. The officer who denied the applicant's H&C application had the FOSS notes from the initial spousal application. The applicant had not received these FOSS notes which were negative for the applicant.

7. The applicant filed an application for leave and judicial review of the negative H&C decision which is the subject matter of this judicial review.

8. The applicant has filed a second spousal application.

[36] It is particularly important to remember that the applicant filed two separate applications, a spousal application and an H&C application. The FOSS notes were made in relation to the spousal application for which no application for leave and for judicial review is pending as it was withdrawn by the applicant.

[37] Thus, I do not agree with the respondent that the spousal sponsorship decision was "converted" to an H&C application. I am not aware of any authority in the Act or its Regulations which permits such a conversion. Counsel for the respondent did say that it was a recommended practice in a manual used by immigration officers, but did not provide a copy of that manual or indicate where. Of course, subsection 25.1(1) of the Act does allow the Minister to initiate a consideration of H&C grounds. However, that does not mean that any earlier process is "converted", in the sense that it simply becomes a preliminary step in the H&C application process.

[38] Consequently, this Court cannot, on this judicial review, deal with the spousal application.

[39] As such, the problem is not whether the spousal sponsorship decision should be set aside; it is whether it was a breach of procedural fairness to rely on the undisclosed reasons for that decision

when determining the H&C application. That is potentially moot, since I have already found that the H&C decision should be set aside. However, pursuant to paragraph 18.1(3)(*b*) of the *Federal Courts Act*, RSC 1985, c F-7, this Court has the power to refer a matter back to a tribunal "for determination in accordance with such directions as it considers to be appropriate." Ultimately, the applicant does seek a direction that the notes be ignored and so this is a live controversy that is properly within this Court's jurisdiction. It requires an answer.

[40] I agree with the applicant that the officer's reliance on the conclusions of the first officer in the FOSS notes is problematic. The applicant had no way of knowing those notes existed and had no opportunity to make any submissions with respect to them at the H&C stage.

[41] On the other hand, that same concern will not be present in a redetermination, since now the applicant does have access to the notes.

[42] Still, that is not enough to cure the unfairness to the applicant. By the respondent's course of action, the applicant was denied his chance to have the spousal sponsorship decision judicially reviewed. Therefore, relying on that decision is to the applicant's disadvantage and is fundamentally unfair and that unfairness would exist as long as the notes remain a factor. I will therefore direct the officer who will hear the H&C matter to ignore the FOSS notes.

[43] The applicant also mentioned his new application for spousal sponsorship and suggested that the direction should apply also to the officer who hears that matter. Although the above logic would suggest the same result, that matter is not yet before the Court and I could not find any provision that gives this Court the power to preemptively make such an order. As such, the direction can only apply to the H&C redetermination.

[44] The application for judicial review is therefore allowed and the matter is referred to a different officer for redetermination. The officer shall not make use of the FOSS notes in reaching a decision.

[45] Neither party wished to propose a serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred to a different officer for redetermination.

2. The officer shall not make any use of the FOSS notes in issue, when reconsidering the application.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	12. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
…	…
13. (1) A Canadian citizen or permanent resident, or a group of Canadian citizens or permanent residents, a corporation incorporated under a law of Canada or of a province or an unincorporated organization or association under federal or provincial law — or any combination of them — may sponsor a foreign national, subject to the regulations.	13. (1) Tout citoyen canadien, résident permanent ou groupe de citoyens canadiens ou de résidents permanents ou toute personne morale ou association de régime fédéral ou provincial — ou tout groupe de telles de ces personnes ou associations — peut, sous réserve des règlements, parrainer un étranger.
…	…
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut

and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

…

…

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

25.1 (1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

***Federal Courts Act*, RSC 1985, c F-7**

18.1 ... (3) On an application for judicial review, the Federal Court may

18.1 ... (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout

proceeding of a federal board, commission or other tribunal.

autre acte de l'office fédéral.

***Immigration and Refugee Protection Regulations*, SOR/2002-227**

4. (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership

4. (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :

(*a*) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

(*b*) is not genuine.

b) n'est pas authentique.

…

…

123. For the purposes of subsection 12(1) of the Act, the spouse or common-law partner in Canada class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.

123. Pour l'application du paragraphe 12(1) de la Loi, la catégorie des époux ou conjoints de fait au Canada est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.

124. A foreign national is a member of the spouse or common-law partner in Canada class if they

124. Fait partie de la catégorie des époux ou conjoints de fait au Canada l'étranger qui remplit les conditions suivantes :

(*a*) are the spouse or common-law partner of a sponsor and cohabit with that sponsor in Canada;

a) il est l'époux ou le conjoint de fait d'un répondant et vit avec ce répondant au Canada;

(*b*) have temporary resident status in Canada; and

b) il détient le statut de résident temporaire au Canada;

(*c*) are the subject of a sponsorship application.

c) une demande de parrainage a été déposée à son égard.

***Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22**

9. (1) Where an application for leave sets out that the applicant has not received the written reasons of the tribunal, the Registry shall forthwith send the tribunal a written request in Form IR-3 as set out in the schedule.

(2) Upon receipt of a request under subrule (1) a tribunal shall, without delay,

(*a*) send a copy of the decision or order, and written reasons therefor, duly certified by an appropriate officer to be correct, to each of the parties, and two copies to the Registry; or

(*b*) if no reasons were given for the decision or order in respect of which the application is made, or reasons were given but not recorded, send an appropriate written notice to all the parties and the Registry.

9. (1) Dans le cas où le demandeur indique dans sa demande d'autorisation qu'il n'a pas reçu les motifs écrits du tribunal administratif, le greffe envoie immédiatement à ce dernier une demande écrite à cet effet selon la formule IR-3 figurant à l'annexe.

(2) Dès réception de la demande prévue au paragraphe (1), le tribunal administratif envoie :

a) à chacune des parties une copie du dispositif et des motifs écrits de la décision, de l'ordonnance ou de la mesure, certifiée conforme par un fonctionnaire compétent, et au greffe deux copies de ces documents;

b) si aucun motif n'a été donné à l'appui de la décision, de l'ordonnance ou de la mesure visée par la demande, ou si des motifs ont été donnés sans être enregistrés, un avis écrit portant cette précision à toutes les parties et au greffe.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Kingsley Jesuorobo	FOR THE APPLICANT
Teresa Ramnarine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kingsley Jesuorobo Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT