Date: 20090127

Docket: IMM-2758-08

Citation: 2009 FC 80

Ottawa, Ontario, January 27, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CHUKS NWAWULOR EBONKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a Pre-Removal Risk Assessment (PRRA) Officer, dated April 30, 2008, denying the applicant's application for an exemption from permanent resident visa requirements on humanitarian and compassionate (H&C) grounds.

FACTS

[2] The applicant, a 40 year old citizen of Nigeria, arrived in Canada on March 13, 2005 and filed a claim for refugee protection. His refugee claim was rejected by the Refugee Protection Division (RPD) of the Immigration and Refugee Board on August 31, 2005. His application for leave to apply for judicial review was denied.

[3] The applicant met his wife, a permanent resident of Canada, in May 2005 and they began a relationship. The applicant was employed as a forklift operator.

[4] In March 2006, the applicant was injured in an accident when he was hit by a pick-up truck while crossing the street. The applicant sustained significant injuries and was unable to continue working. The driver's insurance company admitted liability, but the applicant has pending civil litigation relating to this accident and is still receiving income replacement benefits, medical treatment and rehabilitation for his injuries, and employment retraining. The applicant states that he would not be entitled to any of these benefits and programs if he was not in Canada. He currently supports his wife and two year-old stepson, who was born during the course of their relationship.

[5] The applicant filed an H&C application on May 18, 2006. The applicant and his wife were married on July 18, 2006.

[6] The applicant has two children in Nigeria, who live with their mother, a woman the applicant had a relationship with in his twenties.

[7] On June 4, 2008, the applicant received negative H&C and PRRA decisions and was ordered deported. The applicant filed for leave to appeal the H&C decision.

[8] On July 8, 2008, the applicant was granted leave and a stay of deportation.

<u>Decision under review</u>

[9] In denying the applicant's application, the officer considered the following factors:

1. the country conditions in Nigeria and the risk of harm to the applicant if returned;
2. the applicant's degree of establishment in Canada;
3. the applicant's relationships and familial ties in Canada; and
4. the hardship the applicant would face in re-locating to Nigeria.

[10] The applicant submitted that he was unwilling and unable to return to Nigeria because of his fear of persecution as a member of the opposing political party and the targeting of his family by the ruling political party. The H&C officer noted that the applicant's refugee claim had been denied based on a negative credibility assessment, and stated that although he was not bound by the RPD's finding, he gave considerable weight to it. The officer reviewed the country conditions in Nigeria, finding that little had changed since the applicant's refugee hearing. He concluded:

> While the country conditions in Nigeria may not be ideal, there is no persuasive evidence before me to indicate the applicant would be subject to any conditions not experienced by the population in general if returned to Nigeria. Therefore, I find the applicant has provided insufficient objective evidence that he would face unusual, undeserved, or disproportionate hardship if required to apply for a permanent resident visa from outside Canada.

[11] The officer found that the applicant had been continuously employed, but from the time following his accident, the applicant's replacement income from the insurance company, along with his wife's assistance, allows him to manage without government assistance. The officer was satisfied with the applicant's employment history and accepted that the applicant had made ties to the community through his volunteer work and church membership. However, the officer found that these ties were not sufficient to show that the applicant had established himself in Canada to such a degree that removal would cause him to suffer unusual, undeserved or disproportionate hardship.

[12] Finally, the officer considered the applicant's relationships and familial ties in Canada. The officer recognized that the applicant was married to a Canadian permanent resident, and stated that it was "understandable" that they wished to remain together. The officer stated:

> However, I note family separation is a general result when family members are residents of other countries and the associated hardships related to emotional and financial support, are not in isolation to hardships faced by others whose family unites have been separated in the same manner. I accept that family reunification is a strong factor to consider, however, I note when the applicant left Nigeria he left his mother and two sons behind. Although he does not want to be separated from his wife, previous history demonstrates that separation is not an unusual hardship in that he has been separated from his mother and two sons for an extended period of time.

[13] Finally, the officer considered the applicant's medical difficulties and the potential hardships of re-locating to Nigeria. He found that the applicant had spent his formative years in Nigeria, worked and was educated there, and had friends and family there to ease his transition. With regards to the applicant's medical issues, the officer stated:

> I note the applicant is receiving physical treatment and rehabilitation following his involvement in a motor vehicle accident. However, the applicant has not provided any evidence to demonstrate that he would not be able to access the same physical treatment and rehabilitation upon his return to Nigeria. Moreover, I find the applicant has provided insufficient objective evidence that he has any medical issues or other special needs that need to be addressed in Canada.

[14] The officer therefore concluded that the applicant had not established that he would experience unusual, undeserved or disproportionate hardship if he returned to Nigeria, and that his personal circumstances did not warrant an exception from the normal processing requirements.

ISSUES

[15] The applicant raises two issues in this application:

1. Did the officer err in law by applying the incorrect test in determining whether an H&C exception was warranted?

2. Did the officer fail to consider relevant evidence about the applicant's personal circumstances?

STANDARD OF REVIEW

[16] The applicant submits that while reasonableness is the appropriate standard of review for H&C decisions, the issue of whether the officer applied the correct legal test is a question of law and is therefore subject to a standard of review of correctness. The legal question of whether the officer stated the appropriate legal test is subject to a standard of correctness. However, in so far as the applicant's submissions on the first issue argue that the test was incorrectly applied to the facts of this case, the appropriate standard of review is reasonableness.

[17] With regard to the second issue of whether the officer failed to consider relevant evidence, the appropriate standard of review is reasonableness. See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 62.

ANALYSIS

Issue No. 1: Did the Officer apply the correct test for an H&C application?

[18] The applicant submits that the officer did not distinguish between the threshold under the PRRA test and the threshold under the H&C test in determining whether the applicant faced sufficient risk upon return to warrant an exception. The applicant submits that the officer erred in assessing the applicant's "risk" rather than the applicant's "hardship" upon return, citing the officer's references to the applicant's risk of persecution upon return. For example, the applicant states at page 135-6 of the Application Record:

> It is submitted that the same officer that decided the Applicant's PRRA also decided his H&C application, but in doing [so] imported some of the same conclusions from the PRRA decision concerning risk into the H&C analysis with respect to hardship…It is submitted that this is an error of law as the notion of hardship is notably broader than "risk"…The officer was required to assess "hardship," not risk. For example, the financial loss to his family and his inability to work and provide financial assistance to his family in Canada was ignored.

[19] With respect, it appears that the applicant misunderstood the officer's reasons. The officer was considering, as one of the factors in determining the hardship faced by the applicant, whether the applicant was at a risk of persecution such that returning to Nigeria would pose an unusual, disproportionate or undue hardship. The officer clearly stated:

> In his request for exemption, the applicant has identified a risk of harm…

> Additionally, please refer to the PRRA decision dated 28 April 2008, in which I was the pre-removal risk assessment officer who examined the applicant's allegations of risk against the criteria set out in section 96 and 97 of the *Immigration and Refugee Protection Act.* <u>However, in the context of this H&C application, risk is considered in the context of the applicant's degree of hardship</u>.
>
> …While the country conditions in Nigeria may not be ideal, there is no persuasive evidence before me to indicate the applicant would be subject to any conditions not experienced by the population in general if returned to Nigeria. Therefore, I find the applicant has provided insufficient objective evidence that he would face unusual, underserved, or disproportionate hardship if required to apply for a permanent resident visa from outside Canada.
>
> [Emphasis added]

[20] It is clear that the officer was aware of the appropriate H&C threshold, and that his reference to the term "risk" was not in relation to the threshold required but rather as a factor in establishing hardship. The officer applied the correct test, whether the applicant would face unusual, disproportionate or undeserved hardship, in considering this factor.

[21] The applicant's submission that the officer ignored evidence about the applicant's financial hardship is a separate issue that is relevant in considering whether the officer's decision was reasonable. It does not establish that the officer was unaware that the H&C test includes factors other than risk, as the officer clearly considered factors such as the applicant's degree of establishment and familial ties in Canada. This submission will be considered under the second issue, i.e. whether the officer ignored relevant evidence in reaching his decision.

Issue No. 2: Did the Officer err by ignoring relevant evidence?

[22] The applicant submits that the officer ignored relevant evidence relating to the country conditions of Nigeria, as well as the applicant's degree of establishment. I will also consider the earlier submission relating to the applicant's financial hardship if returned to Nigeria.

[23] The applicant argues that because the officer considered "risk" rather than "hardship," he ignored evidence that may not have been sufficient to meet the higher threshold of risk but may have been sufficient to constitute hardship. At the hearing before the Court, the applicant's counsel described the evidence in the record before the H&C officer about the economic conditions in the Niger Delta region of Nigeria which constitute hardship, but not risk. The H&C decision did not deal with this evidence, in particular the evidence about the severe unemployment and poverty in the region where the applicant would be returned. This evidence could constitute hardship for the purposes of an H&C but was never considered by the H&C officer.

[24] The applicant also submits that the officer minimized the factors supporting the applicant's degree of establishment, including his employment, social, cultural, familial and economic establishment in Canada. The applicant submits that the officer failed to examine the evidence in its totality with regard to the particular circumstances of the applicant.

[25] In concluding that the applicant's separation from his wife would not pose sufficient hardship to warrant an exception, the officer stated that the applicant had previously been parted from his mother and two sons in Nigeria and thus, the separation would not be unusual for him. The

applicant has stated in his affidavit that he never resided with his two sons in Nigeria. They have resided with their mother and her new partner since their birth. Although the applicant helps to support his sons financially, he does not have and has never had a close relationship with them. The officer's reliance on the applicant's separation from these children that he barely knows, and from his mother, a relationship about which there is no evidence on the record, as the basis for his finding that the separation from his wife would not pose unusual hardship was not reasonable, and shows that the officer did not give regard to the particular circumstances of the applicant.

[26] The applicant also submits that the officer ignored evidence of the financial hardship that returning to Nigeria would pose. The applicant was advised that if he left Canada, he would no longer receive his replacement income. He states that he uses this income to support not only his wife and stepson here in Canada, but also to send money to his sons in Nigeria. Further, the applicant had evidence in the form of a letter from his personal injury lawyer stating that he has a strong claim but that if he leaves Canada, it would be difficult if not impossible to pursue this claim. The officer did not mention this evidence in his decision. I find that this evidence is highly relevant and that its exclusion from consideration was not reasonable.

[27] In conclusion, the Court find that the H&C officer unreasonably failed to consider the applicant's personal circumstances with respect to the following:

1. the loss of the applicant's replacement income, if returned to Nigeria;

2. the loss of the applicant's rehabilitation and medical treatment, if returned to Nigeria, and the unlikely prospect that such rehabilitation and medical treatment would be available to the applicant in Nigeria;
3. the loss of the applicant's employment training, if returned to Nigeria;
4. the loss of the applicant's ability to financially support his wife and stepson, as well as his two sons in Nigeria with the money which he received from the replacement income from the insurance company;
5. the hardship to the applicant being separated from his wife and stepson in Canada; and
6. the hardship for the applicant returning to the Niger Delta region where there are no jobs, no prospects of employment, and severe poverty; all of which would affect the applicant.

[28] Since the personal circumstances of the applicant with respect to these aforementioned issues were not dealt with by the H&C officer, the decision is unreasonable and must be set aside.

[29] Both parties advised the Court that there is no question which ought to be certified for an appeal. The Court agrees and no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed and the H&C decision dated April 30, 2008 is set aside.

2. The applicant's H&C application is referred to another H&C officer for re-consideration after the applicant has updated the relevant evidence and submissions with respect to this application.

3. The Court directs that the applicant update and submit to the respondent within 4 weeks of this judgment his evidence and submissions with respect to this H&C application.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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