Date: 20040126
Docket: A-114-03
Citation: 2004 FCA 38

CORAM: STRAYER J.A.
SEXTON J.A.
EVANS J.A.

BETWEEN:

SAMUEL KWABENA OWUSU

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on January 26, 2004.
Judgment delivered from the Bench at Toronto, Ontario, on January 26, 2004.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

Date: 20040126
Docket: A-114-03
Citation: 2004 FCA 38

CORAM: STRAYER J.A.
SEXTON J.A.
EVANS J.A.

BETWEEN:

SAMUEL KWABENA OWUSU

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on January 26, 2004)

EVANS J.A.

[1] Samuel Owusu, a citizen of Ghana, arrived in Canada in 1991 and has been here ever since. His claim for refugee status was unsuccessful. In 1999 he applied to remain in Canada as a permanent resident on humanitarian and compassionate grounds ("H & C"), but in 2001 his application was denied.

[2] Mr. Owusu applied for judicial review of that decision, but his application was dismissed: *Owusu v. Canada (Minister for Citizenship and Immigration)*, 2003 FCT 94. This is an appeal by Mr. Owusu from that decision. These proceedings arise under the now repealed *Immigration Act*, R.S.C. 1985 c. I-2.

[3] The Applications Judge held that the immigration officer had erred in law in rejecting Mr. Owusu's H & C application because she had not been sufficiently attentive to the best interests of his children, who had always lived with his wife, their mother, in Ghana. Nonetheless, the Judge in his discretion decided not to set aside the decision, on two grounds. First, Mr. Owusu had unaccountably failed to provide any evidence to support the allegation that his deportation to Ghana would be contrary to the best interests of his children because he would be unable to find work and support

them financially. Second, if the matter were remitted for redetermination by another officer on the same material, the application was bound to be rejected.

[4] In our view, the Applications Judge was correct to dismiss the application, but for the reasons that follow.

[5] An immigration officer considering an H & C application must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children who may be adversely affected by a parent's deportation: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 75. However, this duty only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies on this factor, at least in part. Moreover, an applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless.

[6] Although the lawyer representing Mr. Owusu when he made his H & C claim submitted a single-spaced, seven-page letter, the only reference to his children is on page 4:

> Should he be forced to return to Ghana[Mr. Owusu] *will not have any ways to support his family financially* and he will have to live every day of his life in constant fear. [Emphasis added]
>
> The principal grounds on which Mr. Owusu urged the immigration officer to exercise the statutory discretion in his favour were his fear of reprisals in Ghana because of his political activities and associations there before he left, and his successful establishment and social integration in Canada, where he has lived since 1991, and worked continuously since 1993.

[7] Mr. Owusu now says that while he has been in Canada he has supported his children, who are financially dependent on him, and that he has evidence to show that he has remitted money to them on a regular basis. Unfortunately, none of this was before the immigration officer when she made her decision. Apparently, Mr. Owusu's lawyer thought the grounds on which the H & C application was primarily based would be sufficient to obtain a favourable decision and that, in any event, Mr Owusu would be called for an interview at which he could present material showing that he had been supporting his children.

[8] H & C applicants have no right or legitimate expectation that they will be interviewed. And, since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril. In our view, Mr. Owusu's H & C application did not adequately raise the impact of his potential deportation on the best interests of his children so as to require the officer to consider them.

[9] The half-sentence on page four of the seven-page letter, quoted above in [6], said only that Mr. Owusu would be unable to support his family financially if he was deported was too oblique, cursory and obscure to impose a positive obligation on the officer to inquire further about the best interests of the children. The letter did not

say that Mr. Owusu had been supporting his children from the money he earned while in Canada, and that they were financially dependent upon him and would be deprived of that support if he was deported. Nor was there any proof before the officer of any of these facts.

[10] Counsel argued that the officer should have inferred from what the letter did say that Mr. Owusu's children would be deprived of the financial support on which they depended if their father was deported. In the circumstances, the officer is not to be faulted for failing to draw this inference. Hence, the immigration officer did not err in rejecting the H & C application without analysing the likely impact of her decision on Mr. Owusu's children.

[11] Nor are we persuaded that, even though the officer mistakenly said that Mr. Owusu's mother lived in Ghana at the time of the decision, she committed a reviewable error in inferring from the H & C application that Mr. Owusu's ties were stronger to Ghana, where his wife and children lived, than to Canada, despite his ten years' residence here.

[12] In the absence of a reviewable error by the immigration officer in rejecting Mr. Owusu's H & C application, the Court cannot intervene. It is not the function of the Court in judicial review proceedings to substitute its view of the merits of a H & C application for that of the statutory decision-maker, even though, on the record, Mr. Osuwu's in-country claim to be granted permanent resident status on H & C grounds might well have merit.

[13] In deciding to dismiss the appeal, we must not be taken to have affirmed the Applications Judge's view that an immigration officer's duty to consider the best interests of a H & C applicant's children is engaged when the children in question are not in, and have never been to, Canada. This interesting issue does not arise for decision on the facts of this case and must await a case in which the facts require it to be decided.

[14] We do note, however, that the Supreme Court of Canada knew in *Baker* that the immigration officer had before him information that Ms. Baker had four children in Jamaica, as well as four in Canada: *Baker* at para. 5. However, the Court made no mention of the four Jamaica-based children, nor did it comment on any consideration that the immigration officer gave or failed to give to the best interests of the children who did not reside in Canada.

[15] Nor do we find it necessary to consider whether the Judge was correct to conclude that if, as he found, the immigration officer had erred in failing to consider the best interests of the children, the matter could be remitted to another officer for redetermination on the basis of the materials that were before the immigration officer when she made the decision under review in this proceeding.

[16] Consequently, it is unnecessary for us to answer the following question certified by the Applications Judge and we decline to do so:
Where, as in this matter, a Trial Judge finds a reviewable error on an application for judicial review of a decision engaging the best interests of a child or children, is the Trial Judge obligated to set aside the decision under review and to remit the matter for

reconsideration and redetermination on the basis, not merely of the record that was before the decision-maker whose decision is set aside, but on the basis of that record and any new evidence and submissions that the applicant might determine to put before the officer conducting the reconsideration and making the redetermination?

[17] For these reasons, the appeal will be dismissed.

"John M. Evans"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET :	A-114-03
STYLE OF CAUSE :	SAMUEL KWABENA OWU Appellant and THE MINISTER OF CITIZENSHIP AND IMMIGRATION Respondent
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 26, 2004
REASONS FOR JUDGMENT OF THE COURT:	(STRAYER, SEXTON, EVANS JJ.A.)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

APPEARANCES:

Mr. Mark Rosenblatt	FOR THE APPELLANT
Ms. Ann-Margaret Oberst	FOR THE RESPONDENT

SOLICITORS OF RECORD :

Mark Rosenblatt Barrister and Solicitor Toronto, Ontario	FOR THE APPELLANT
Morris Rosenberg Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT