

Federal Court



Cour fédérale

**Date: 20150610**

**Docket: IMM-7934-14**

**Citation: 2015 FC 727**

**Ottawa, Ontario, June 10, 2015**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**SONIA OKPERE  
EZEKIEL OKPERE**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**  
**(rendered on the bench)**

I. Overview

[1] Although the best interests of the child are not determinative, in and of themselves, of the outcome of a humanitarian and compassionate [H&C] determination, they are nonetheless a significant factor which must specifically be shown to be adequately weighed, in accordance

with the *Convention on the Rights of the Child* [Convention] (*Kolosovs v Canada (Minister of Citizenship and Immigration)*), [2008] FCJ No 211, at para 8 [*Kolosovs*]).

## II. Introduction

[2] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a Senior Immigration Officer's [officer] decision rejecting the Applicants' claim for permanent residence from within Canada based on H&C grounds pursuant to subsection 25(1) of the IRPA.

[3] The Court does not find that the officer was alive, alert and sensitive to the best interests of the children affected. The Court's intervention is therefore warranted.

## III. Factual Background

[4] The principal Applicant [Applicant] and her 9-year-old son are citizens of Nigeria.

[5] The Applicant claims that her life is threatened due to her refusal to succeed her late father as the village's native doctor, based on her Christian beliefs.

[6] The Applicants arrived in Canada on September 21, 2008, and were detained upon arrival.

[7] The Applicant gave birth to her first daughter while in detention, on October 22, 2008, and gave birth to her second daughter on November 6, 2013.

[8] The Applicants' refugee claim was rejected by the Refugee Protection Division on November 5, 2010.

[9] On January 31, 2011, the Applicant married a Canadian citizen. The couple filed an application for permanent residence in the spousal category, which was denied on April 24, 2012, on the basis that they failed to demonstrate that their marriage was *bona fide*.

[10] The Applicant filed an H&C application on August 6, 2013, which was dismissed on September 30, 2014, on the basis that the Applicants failed to demonstrate that they would suffer unusual, undeserved or disproportionate hardship.

#### IV. Legislative Provisions

[11] The following provisions of the IRPA are applicable in respect of H&C applications:

**Application before entering  
Canada**

**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

**Visa et documents**

**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.

this Act.

**Humanitarian and  
compassionate  
considerations — request of  
foreign national**

**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 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.

**Séjour pour motif d'ordre  
humanitaire à la demande de  
l'étranger**

**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 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.

V. Issues

[12] The Applicants submit the following issues to be determined by this Court:

- a) Was the officer alive, alert and sensitive to the children's best interests, in accordance with section 25 of the IRPA?

- b) Does the impugned decision respect the rights of the Applicant and her children to the protection of family life?
- c) Did the officer consider the hardship that a single mother and her children would experience, such as exclusion, isolation, poverty, and gender violence, were they to be removed to Nigeria?
- d) Is the officer's decision reasonable?

[13] The Court considers that the determinative issues can be summarized under the two following issues:

- a) Does the impugned decision adequately consider the best interests of the children affected?
- b) Is the officer's decision reasonable?

## VI. Analysis

[14] The standard of review applicable to the exercise of the officer's discretion in assessing an H&C application, including the best interests of the children affected, is that of reasonableness (*Mikhno v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ 583 at paras 21-23; *Kisana v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ 713 at para 18).

[15] The Applicants submit that the officer's findings are unreasonable, particularly in respect of the best interests of the children, the family's level of establishment in Canada and the hardship they would suffer upon return to Nigeria. The Applicants further submit that their

removal would violate principles of international law and section 7 of the *Canadian Charter of Rights and Freedoms*.

[16] In considering H&C applications, officers must be “alert, alive and sensitive” to the best interests of the children affected and take into account, where possible, the children’s perspective, in order for their decision to fall within the realm of reasonableness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 [*Baker*]; *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at para 68).

[17] Although the best interests of the child are not determinative, in and of themselves, of the outcome of an H&C determination, they are nonetheless a significant factor which must specifically be shown to be adequately weighed, in accordance with the Convention (*Kolosovs*, above at para 8).

[18] The principles embodied in the Convention are relevant in addressing the reasonableness of an H&C decision under judicial review:

[71] The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". [page862] A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations Declaration of the Rights of the Child (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights.

They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

[Emphasis added.]

(*Baker*, above at para 71)

[19] A careful reading of the decision under review reveals that the officer's findings are primarily focused on the principal Applicant's failure to provide sufficient evidence demonstrating that the welfare of the Applicant's children would be compromised by the requirement of filing a permanent residence application abroad.

[20] The officer's analysis is flawed in that the children's needs and interests are not adequately identified, defined and examined (*Zazai v Canada (Minister of Citizenship and Immigration)*, 2012 FC 162 at para 51; *Legault v Canada (Minister of Citizenship and Immigration)*, [2002] FCJ 457 at paras 12 and 31). Among others, the officer's analysis fails to identify whether it is in the best interests of the minor Applicant to remain in Canada in order to pursue his education, and the impact of the Applicants' removal, and the family's ensuing separation, on the three children affected, including the Applicant's Canadian-born daughters, who are respectively one and six years old (*Velji v Canada (Minister of Citizenship and Immigration)*, 2014 FC 467 at para 8).

[21] Similarly to the Court's finding in a recent decision rendered by Justice John A. O'Keefe, "[t]here is no balancing of the negative and positive factors as they relate to the best interests of the children" (*Qosaj v Canada (Minister of Citizenship and Immigration)*, 2015 FC 689 at para 49). Therefore, a need exists to consider the significant specific objective and subjective

evidence as per the documents on file in respect of the current situation in Nigeria. Contrary to the Court's teachings in *Kolosovs*, the children's best interests and perspectives were not taken into account:

[11] Once an officer is aware of the best interest factors in play in an H&C application, these factors must be considered in their full context and the relationship between the factors and other elements of the fact scenario concerned must be fully understood. Simply listing the best interest factors in play without providing an analysis on their inter-relationship is not being alive to the factors. In my opinion, in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably [be] determined.

[12] It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief.

[Emphasis added.]

(*Kolosovs*, above at paras 11 and 12)

[22] It does not appear from the officer's reasons that the officer was alive, alert and sensitive to the best interests of the children affected by its decision, rendering the decision unreasonable.

## VII. Conclusion

[23] In light of the foregoing, the application is granted and the matter is referred to a different officer for determination anew.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is granted.

The matter is to be heard anew by a different officer. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-7934-14

**STYLE OF CAUSE:** SONIA OKPERE, EZEKIEL OKPERE v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

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**JUDGMENT AND REASONS:** SHORE J.

**DATED:** JUNE 10, 2015

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