Federal Court  Cour fédérale

Date: 20150824

Docket: IMM-568-15

Citation: 2015 FC 1002

Ottawa, Ontario, August 24, 2015

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JOSHUA ADELOWD ANJORIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Senior Immigration Officer of Citizenship and Immigration Canada [Officer] wherein the Applicant was denied an exemption on humanitarian and compassionate [H&C] grounds to allow his application for permanent residence to be processed from within Canada.

[2] The Applicant asserts that he would face unusual, undeserved and disproportionate hardship if he were obliged to return to Nigeria to pursue his permanent residence application. He argues that he has become established in Canada, that in returning to Nigeria he would experience hardship related to discrimination and adverse country conditions because he is a Christian and his family has been threatened by members of the Boko Haram militant group, and that he suffers from mental illness, which would be exacerbated by a return to Nigeria where adequate treatment would not be available.

[3] The Applicant seeks to have the Court set aside the decision of the Officer and refer this matter back for redetermination by a different officer.

[4] For the reasons that follow, this application is allowed.

I. Background

[5] The Applicant is a citizen of Nigeria. He has no immediate family members in Canada and indicates that his parents reside in Nigeria. He previously claimed refugee status, which was denied by the Refugee Protection Division [RPD] of the Immigration and Refugee Board.

[6] The Applicant states that his father and brother were both Christian pastors in Nigeria. The Applicant lived with his brother in Nigeria. Beginning in 2009, the Boko Haram militant group launched an insurgency, which resulted in the murders of hundreds of people, especially Christians.

[7] The Applicant claims that on the night of January 17, 2010, a group of ten armed militants, who were targeting Christians in the neighbourhood, rushed into his house. He was able to escape, but his brother was killed, along with many in the area. He and thirty others ran into the forest, where they hid for about two weeks before returning to town.

[8] He feared that those who killed his brother would be looking for him because he could identify them. At that time, his parents resided in Sierra Leone and the Applicant had no immediate family in the country. He decided to leave, travelling to the Ivory Coast, and then through Botswana, Malaysia and the Netherlands, before reaching Canada with a fraudulent Botswana passport. On April 12, 2011, the Applicant entered Canada and submitted a claim for Convention refugee protection.

[9] On July 9, 2013, his refugee claim was denied by a panel of the RPD. The RPD found that the attack on the Applicant, his brother and others was considered to be random and that it was unlikely that he would be targeted by the militants who killed his brother. The RPD also noted that, after returning from the forest, the Applicant continued to serve as an evangelist with the Christ Apostolic Church in the area for seven months. The RPD found that throughout this seven month period, there was no indication that the Applicant received any direct threats on his life.

[10] The RPD considered the following: Boko Haram's activities are concentrated in the northern regions and that the southern regions, where Christians form a majority, had not been subjected to attack; the Applicant's parents had returned to the country and were living in the

south; and that he had a relationship with his parents. The RPD found that he could return and live with his parents in the south, while remaining faithful to his religion.

[11] On October 4, 2013, the Applicant was denied leave for judicial review of his negative RPD decision.

[12] The Applicant subsequently applied for permanent residence citing H&C considerations and, on February 6, 2014, this application was refused. On May 30, 2014, his application for leave and judicial review of that H&C decision was denied.

[13] The Applicant subsequently submitted another permanent residence application based on H&C, and on January 7, 2015, he was again denied the H&C exemption in the decision, which is the subject of this judicial review application.

II. Decision of Senior Immigration Officer

A. *Hardship Relating to Risk/Harm and Adverse Country Conditions in Nigeria*

[14] The Officer considering the application for permanent residence recited the RPD findings and then considered the submissions of the Applicant's counsel, with documentary support, that the risk to Christians is no longer limited to northern Nigeria, as Nigeria is in fact on the brink of a civil war due to the deep religious divides in the country.

[15] The Officer found the information in the articles provided by the Applicant to be speculative in terms of the hardship associated with the Applicant returning to the south of Nigeria to reside with his parents. The comment from counsel regarding the country being on the brink of a civil war was found to be speculative as it was attributed to an attorney in one of the articles provided. Another article by the Soufan Group stated that the reports of southern attacks were rumours and misleading. The Officer concluded that the evidence did not support that the Applicant personally faced discrimination and/or adverse conditions in predominately Christian southern Nigeria.

[16] The Officer also referred to the United States International Religious Freedom Report for Nigeria in 2013 that supported a conclusion that the country's constitution and other laws protected religious freedom. This Report also reflected that the government was ineffective in preventing or quelling religious-based violence and only occasionally investigated, prosecuted or punished those responsible. The Officer's decision further references reports of societal abuses and discrimination based on religious affiliation, belief or practise in the northern and central states. However, overall the Officer concluded that the evidence did not support that the Applicant would face unusual and undeserved or disproportionate hardship if he were to return to Nigeria to relocate and reside in the southern area as had been suggested by the RPD panel.

B. *Establishment in Canada*

[17] The Officer considered the following:

A. That the Applicant received 14 years of education in Nigeria including some post-secondary study;

B. There was no information indicating he has attended any course while in Canada;

C. From April 2011 until October 2011, he was unemployed;

D. From October 2011 until December 2013, he was employed as a fork lift driver in Montreal, where he was involved with his church and community;

E. Since January 2014, he had been employed as a fork lift driver in Calgary;

F. The Applicant had not provided updated letters to support his community involvement in Calgary;

G. While not determinative, he had not provided proof of saving or ownership of assets in Canada or proof of the submission of Federal Income Taxes;

H. He appeared to have maintained a good civil record in Canada; and,

I. He had received letters of support from friends and others, although the letters did not support that anyone in Canada would suffer an unusual, undeserved or disproportionate hardship if the Applicant were to return to Nigeria.

[18] After considering applicable Federal Court authorities, the Officer concluded that the evidence did not support a finding that the Applicant had become established in Canada to the extent that severing his ties would amount to an unusual or undeserved or disproportionate hardship.

C. *Other Factors*

[19] The Applicant's counsel provided a written submission indicating that the Applicant suffers from "essential" Post-Traumatic Stress Disorder [PTSD] as a result of having seen his brother decapitated in Nigeria. Counsel asserted that the Applicant would be unable to secure mental health assistance if returned to Nigeria and provided a report dated June 6, 2014 [the Report] from a psychologist, who had examined the Applicant at counsel's request. It was noted that no information was provided to support that the Applicant had otherwise sought treatment in Canada.

[20] The Officer reviewed the Report and highlighted the following statements in the Report:

A. The Applicant does not suffer from a mental disorder at this time. He is sub syndrome for PTSD with important features of the disorder and is at risk for its reoccurrence but is not diagnosed with PTSD at this time;

B. His recovery in Canada leaves him not showing the required number of symptoms for one of the sets required for a PTSD diagnosis;

C. He will not recover with treatment but is essentially "haunted" by the death of his brother; and,

D. Remaining in Canada, the Applicant will have "a substantially positive prognosis".

[21] The Officer acknowledged that the Applicant was profoundly affected by the death of his brother but noted that the psychologist had recommended no specific treatment for the Applicant

other than for him to remain in Canada. The Officer found the phycologist's comments speculative in terms of his assessment of the Applicant and that he did not provide an objective basis for his comments. The information before the Officer did not support that the Applicant suffered from an illness or condition for which he would be unable to obtain support or medical care in Nigeria.

[22] Additionally, the documentation did not support that he would have difficulties readjusting to Nigerian society and culture. The Officer stated that the Applicant was educated and employed in Nigeria in the past and had obtained experience in Canada that may assist him in securing future employment. He also had his parents in Nigeria, and there was no evidence that they would be unable to support him, if only emotionally.

[23] Overall, the Officer concluded that the Applicant had not demonstrated that his personal circumstances were such that the hardship of not being granted the requested exemption would be unusual and undeserved or disproportionate.

III. Standard of Review

[24] The parties agree, and I concur, that the standard of review, for assessing the Officer's assessment whether H&C consideration is warranted on the facts of a particular application for permanent residence made from within Canada, is reasonableness (*Canada (MCI) v Khosa* 2009 SCC 12 at para 53).

IV. Issues

[25] Based on the parties' submissions, I would characterize the sole issue in this application as whether the Officer's decision, based on the factors relevant to the hardship associated with the Applicant returning to Nigeria, was unreasonable.

V. Submissions of the Parties

A. *Applicant's Position*

[26] First, the Applicant submits that the Officer did not undertake a sufficient analysis of the factors relevant to an H&C application. The Officer relied on the findings and factors outlined by the RPD and used them as grounds for denying the application. The Applicant submits that the Officer's reliance on the findings of fact by the RPD is problematic, as humanitarian relief is meant to be based upon an evaluation of hardship upon return and not of risk. Therefore, the fact that the Applicant's circumstances may not have been sufficient to establish risk is not indicative of whether they constitute hardship.

[27] Second, the Applicant submits that the Officer lacked empathy and failed to appreciate the Applicant's circumstances. In particular, the Officer failed to appreciate the mental illness of the Applicant, in calling into question the assessment of a highly qualified psychologist and ignoring evidence of the lack of medical support in Nigeria. Rather than speaking to the weight of the Report, the Officer questioned the expert's assessment of the Applicant and made a bold

assertion that the Applicant would be able to obtain support or medical care for his mental illness in Nigeria without providing any objective documentary evidence for this proposition.

[28] Regarding the Report, the Applicant also notes that the psychologist who diagnosed the Applicant did so in accordance with the "Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition". This classification serves as a universal authority for psychiatric diagnosis and corroborates the neutrality of the assessment. He argues that the Officer fails to explain the rejection of the findings in the Report and misses the point of the Report, which does not focus on treatment for his psychological problems but rather on the fact that a return to Nigeria would damage the Applicant's psychological health.

[29] Finally, the Applicant argues that the Officer made unfounded assumptions of parental support, as there was no evidence before the Officer to indicate the nature of the Applicant's relationship with his parents or their support.

B. *Respondent's Position*

[30] The Respondent submits that the Officer recognized that her role was to consider the facts presented through a lens of hardship and not to undertake a risk assessment or substitute her decision for that of the RPD. The Officer differentiated the two processes.

[31] In the decision, the Officer set out the submissions that were made by the Applicant before the RPD and that were provided as part of the Applicant's H&C application. It is not improper for the Officer to summarize the RPD decision. The decision demonstrates that the

Officer assessed the application based on the submissions made before her. These included the submission that, since the RPD decision, the situation in Nigeria had changed. The Officer explicitly addressed this submission and considered the reports and articles provided in support.

[32] The Respondent submits that the Officer determined that the evidence did not establish that the Applicant would personally suffer hardship in southern Nigeria. The decision demonstrates that the Officer undertook her own assessment of the evidence including that the brunt of religious-based violence and Boko Haram's activities has been felt in the northeast. However it was not established that the Applicant would personally suffer hardship in Nigeria's predominantly Christian south.

[33] With respect to the hardship relating to the Applicant's mental health, the Officer did not conclude that the Applicant would be able to obtain support or medical care for his mental illness in Nigeria but rather that the information before her did not support that the Applicant suffered from an illness or condition for which he would be unable to obtain support or medical care for in Nigeria.

[34] The Respondent submits that the Officer was not obliged to accept the opinion of the psychologist. This Court has stated that decision-makers should be wary of reliance on expert evidence obtained for the purpose of litigation, unless it is subject to some form of validation. The Officer properly exercised caution in weighing the Report, given that the Applicant met with the psychologist only once, he had not sought or received treatment, and the psychologist

recommended no specific treatment or therapy for the Applicant aside from recommending that he be allowed to remain in Canada.

[35] At the hearing of this application, the Respondent also referred the Court to the decision in *Basaki v Minister of Citizenship and Immigration*, 2015 FC 166 [*Basaki*], in which the Court held that the H&C officer properly evaluated a PTSD report in stating that that there was no evidence of follow-up treatment or that follow-up sessions took place. The Respondent argues this to be analogous to the present case in which the Officer found the conclusions in the Report speculative and lacking in objectivity, which finding the Respondent says is a result of the Report having been prepared as a result of one session between the Applicant and the psychologist, for purposes of supporting the H&C application and without the Applicant otherwise having sought mental health treatment or counselling in Canada.

[36] The Respondent also submits that the decision in *Carrillo v Minister of Citizenship and Immigration*, 2015 FC 233 [*Carrillo*] is analogous. In that case, the Court held that the H&C officer reasonably considered the main conclusion in the psychologist's report that the applicant would suffer from PTSD wherever he is in the world and reasonably determined that there were health care facilities and treatment available in the applicant's country of origin.

VI. Relevant Legislation

[37] The relevant statutory provision is section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], which provides as follows:

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.	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.

[38] The test to be used in making a decision on an H&C application is whether the applicant would suffer unusual and undeserved or disproportionate hardship in having to make his application for permanent residence from outside Canada.

VII. Analysis

[39] In my assessment, this application turns on the Officer's treatment of the Report. The Report was authored by Dr. Hap Davis, a registered psychologist in Alberta and Nova Scotia

with over 40 years of clinical experience. Dr. Davis goes into considerable detail to explain the literature, statistics and standards that represent the objective basis for his conclusions, including the criteria for diagnosis of PTSD prescribed by the "American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition" [DSM-5]. I share the Applicant's concerns about the Officer's dismissal of Dr. Davis's conclusions as speculative and lacking objectivity without explaining such conclusion.

[40] I am conscious of the Respondent's point, relying on *Czesak v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1149 at paras 38-40, that decision-makers should be wary of reliance on expert evidence obtained for the purpose of litigation, unless it is subject to some form of validation. However, while the Officer's decision does refer to the fact that Dr. Davis examined the Applicant at the request of counsel and that he had not otherwise sought mental health treatment, the Officer does not reject Dr. Davis' conclusions on that basis, but rather on the basis that they are speculative and lack objectivity. No justification is offered for this finding. As held by Justice Campbell in *Tesema v Canada (Minister of Citizenship & Immigration)* 2006 FC 1417 at para 5:

> [5] The issue for determination is whether, in rejecting the opinion, the RPD committed a reviewable error. In *Gina Curry v. Minister of Citizenship and Immigration*, IMM-10078-04, dated December 21, 2005, Justice Gauthier clearly delineates an immigration officer's discretion in assessing psychiatric or psychological evidence:
>
> > As it has been mentioned on numerous occasions by this Court, immigration officers are not experts in psychology or psychiatry. They cannot simply discard experts' opinions without giving at least one good reason that stands up to probing examination.

[41] As an explanation for the Officer's conclusion, the Respondent refers to the fact the Officer noted that Dr. Davis recommended no specific treatment or therapy for the Applicant aside from recommending that he be allowed to remain in Canada. However, I do not consider this to be a reason that stands up to probing examination, as it highlights another deficiency in the Officer's treatment of the Report, which is that the Officer misunderstands, or at least fails to address, the main point of the Report. As argued by the Applicant, Dr. Davis' principal conclusions do not relate to treatment for the Applicant's psychological problems but rather to the impact that a return to Nigeria would have on his psychological health.

[42] This error by the Officer is further highlighted by the final sentence in the Officer's analysis of the mental health issue:

> The information before me does not support that the applicant suffers from an illness or condition for which he would be unable to obtain supports or medical care in Nigeria.

[43] The Applicant submitted in oral argument that this conclusion is inconsistent with the evidence in the Report as to the lack of availability of mental health services in Nigeria (e.g. there being roughly 2 psychologists per 10 million persons). However, I believe this argument misses the point of the Officer's conclusion, which does not relate to the adequacy of medical care in Nigeria for the Applicant's mental health condition. Rather, as noted by the Respondent in written submissions, the Officer's finding is that the evidence does not support that the Applicant suffers from such a condition. This finding appears to be based on the quotations from the Report contained in the decision, to the effect that the Applicant is not currently diagnosed with PTSD.

[44] Again, this finding demonstrates a misunderstanding of, or failure to address, the thrust of Dr. Davis' opinion. That opinion is that, of the five "sets" of symptoms that the DSM-5 criteria prescribe for diagnosis of PTSD, the Applicant demonstrates four sets and one, but only one, of the symptoms for the fifth set (related to persistent negative cognitions). On this basis, Dr. Davis refers to the Applicant as being "subsyndrome" for PTSD. He explains that the Applicant should be understood to have "essential" PTSD, that he did have both PTSD and Major Depressive Disorder at an earlier time, and that he is at risk of recurrence of PTSD.

[45] Dr. Davis also explains that the fact the Applicant is not currently diagnosed with PTSD is a result of his psychological recovery in Canada. His opinion is that the Applicant will not recover with psychological or psychiatric treatment but that, if he remains in Canada, his mental health may be restored simply by his perception of security. Dr. Davis contrasts this positive prognosis with a negative prognosis if the Applicant were to return to Nigeria, the place of the circumstances that he fears.

[46] The Officer appears to have based her conclusion on the mental health issue on the fact that the Applicant is not currently diagnosed with PTSD. This was an unreasonably formalistic analysis, which failed to address the import of Dr. Davis' opinion based on the Applicant's mental health history, the details of his current condition, and predicted outcomes. I appreciate the point raised by the Respondent in oral argument, that an H&C officer might reasonably be skeptical of a medical opinion offered in an immigration context that the only treatment for a particular condition is to remain in Canada. With the benefit of a fulsome analysis of Dr. Davis' opinion, the Officer might have decided to give it insufficient weight and concluded that the

Applicant had not demonstrated unusual and undeserved or disproportionate hardship. However, the Court cannot know this, as the decision does not demonstrate sufficient analysis of the import of Dr. Davis' evidence to be intelligible and justifiable and therefore reasonable.

[47] Conscious of the Respondent's reliance on *Basaki* and *Carrillo*, I note that my conclusions are based on the specific facts of this case and are not intended to detract from those authorities.

[48] On the basis described above, the H&C application must be referred back for redetermination by another officer. It is accordingly unnecessary for me to consider the other bases on which the Applicant seeks to challenge the decision.

[49] Neither party raised a question of general importance for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the matter is referred back for redetermination by another officer. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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